

**BRITAIN'S RIGHT TO ROAM: REDEFINING THE LANDOWNER'S BUNDLE OF STICKS**  
**JERRY L. ANDERSON**

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## ABSTRACT

In 2000, Britain enacted a “right to roam” in the Countryside and Rights of Way Act (CRoW). At first glance, CRoW appears to be a dramatic curtailment of the landowner’s traditional right to exclude: it opens up all private land classified as “mountain, moor, heath, or down” to the public for hiking and picnicking. Yet, when viewed in the light of history, CRoW may be seen as partially restoring to the commoner rights lost during the enclosure period, when the commons system ended. CRoW also represents a return to a functional rather than spatial form of land ownership, allowing more than one party to have rights in a particular piece of land. The new law highlights some important public values regarding freedom of access that have been all but forgotten in the United States. The law calls into question U.S. Supreme Court precedent that has enshrined the right to exclude as an “essential” stick in the bundle of property rights and serves as a powerful alternative to the Court’s formalistic notion of property rights. Although, given the differences in our history, culture, and legal systems, the United States is unlikely to follow Britain’s lead in enacting a right to roam, the study of CRoW contains valuable lessons for Americans.

**Britain's Right to Roam: Redefining the Bundle of Sticks**  
**Jerry L. Anderson<sup>1</sup>**

*“No man made the land: it is the original inheritance of the whole species.... The land of every country belongs to the people of that country.”*  
- John Stuart Mill<sup>2</sup>

**I. Introduction**

At least since Blackstone, property rights discourse has been plagued by absolutism, the notion that the right of property should be defined as the “sole and despotic dominion” over the *res*, to the “total exclusion of the right of any other individual in the universe.”<sup>3</sup> Property professors and courts generally refer to the collection of rights that private property owners enjoy vis-a-vis other landowners and the public as a “bundle of sticks,” in an attempt to render rather abstract concepts more concrete.<sup>4</sup> The prevailing metaphor, however, lends itself to a formalistic, absolutist conception of these interests, implying that the sticks, such as the right to devise or the right to convey, are things, much like your car or your house; therefore, the composition of the bundle must be an immutable and essential state of affairs.<sup>5</sup>

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<sup>1</sup> *Richard M. and Anita Calkins Professor of Law*, Drake University Law School. The author wishes to thank the anonymous donor of the Drake International Research Stipend who generously enabled this research. In addition, the author acknowledges the research assistance of Terica Keaton and Aaron Brees. I would also like to thank librarian Sherry VonBehren for her energetic, timely, and cheerful assistance in procuring hard-to-find sources. For clarifications of European law, I thank Dutch lawyers and friends Wouter Hertzberger and Jan Franken. For acquainting me with European land use issues, I thank the Östling brothers, Fred, Kent, and Paul-Erik, and my Swedish “sister” Marianne Levander. I benefited also from suggestions from my faculty colleagues who participated in a Drake faculty colloquium, especially Professor Neil Hamilton. Finally, thanks to Susan Anderson for her editing skill.

<sup>2</sup> John Stuart Mill, *PRINCIPLES OF POLITICAL ECONOMY*, Book II, Ch. II, §6 (1848).

<sup>3</sup> William Blackstone, *COMMENTARIES ON THE LAWS OF ENGLAND*, Book the Second, at 2.

<sup>4</sup> Joseph William Singer, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES*, xlvii (3d ed., Aspen Publishers, Inc. 2002), *U.S. v. Craft*, 535 U.S. 274, 274 (2002).

<sup>5</sup> See Craig Anthony Arnold, “The Reconstitution of Property: Property as a Web of Interests,” 26 *HARV. ENVTL. L. REV.* 281 (2002)(suggesting that bundle of sticks metaphor hinders environmental protection goals).

In contrast, many scholars insist that property rights are neither static nor absolute. The recognition of private property interests involves trade-offs with community values and egalitarian goals and, therefore, the exact composition of the bundle of sticks must be recognized as a mediation between these interests.<sup>6</sup> Moreover, the balance struck is always tentative, subject to constant re-evaluation in light of current needs and norms.<sup>7</sup> Certainly, the relative stability of property rights over time is not only fair to those who strive to obtain them, but is also desirable for society to function.<sup>8</sup> Nevertheless, some evolution in our conception of the proper scope of property rights is both inevitable and desirable.

The United States Supreme Court has furthered a formalistic, absolutist conception of property rights by adopting the bundle of sticks metaphor and placing the landowner's "right to exclude" at the top of the woodpile. In a series of cases, the Supreme Court has canonized the right to exclude others as "essential" to the concept of private property.<sup>9</sup> Completely absent from the Court's analysis is recognition that the landowner's right to exclude involves a balance with the public's interest in access. The public may desire access to these lands for the purpose of reaching some public destination, such as a beach or park, or it may value access for its own sake, to enjoy the

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<sup>6</sup> Robert C. Ellickson, "Property in Land," 102 *YALE L. J.* 1315, 1345 (1993) (property systems are "a major battleground" on which the conflict "between individual liberty and privacy on the one hand and community and equality on the other" is resolved).

<sup>7</sup> See Laura S. Underkuffler, *THE IDEA OF PROPERTY: ITS MEANING AND POWER*, at 93 (2003) ("All individual and public claims [to property] are subject to dispute, discard, evolution, and change, as societally constructed understandings"); Eric T. Freyfogle, "Eight Principles for Property Rights in an Anti-sprawl Age," 23 *WM. & MARY ENVTL. L. & POL'Y REV.* 777, 785-86 (1999) (property rights and ownership norms evolve over time); Maria Ågren, "Asserting One's Rights: Swedish Property Law in the Transition from Community Law to State Law," 19 *LAW & HIST. REV.* 241, 243 (2001) (property rights systems change over time, citing historical analyses of property rights).

<sup>8</sup> Freyfogle, "Eight Principles," at 785 (property rights must be relatively stable to serve economic functions, yet flexible enough to meet current societal needs).

<sup>9</sup> *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

aesthetic values the private land and its surroundings offers. While the public interest has figured into a few state court decisions on access,<sup>10</sup> the Supreme Court has not so much as mentioned it in upholding a seemingly absolute right to exclude.

Blackstone's descendants, in contrast, take a much different view of the balance of interests. Britain's<sup>11</sup> recent enactment of a "right to roam" in the Countryside and Rights of Way Act 2000 (CRoW)<sup>12</sup> provides a fascinating study of how the right to exclude may be modified to accommodate public needs without unduly impacting the interests of the private landowner. CRoW classifies private land that contains mountains, moors, heath or downland<sup>13</sup> as "open country," and requires landowners to allow the public to roam freely across these lands. CRoW opens up millions of acres of private land to public access, without compensating the landowners for this limitation on their right to exclude. As a result, the law represents a dramatic shift in the allocation of the bundle of sticks.

The impetus for CRoW can be understood fully only by delving into British history and culture. Britons have long valued public access to the countryside, so that the public can fully enjoy its amenities.<sup>14</sup> The romantic vision of a rural walk is enshrined in

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<sup>10</sup> See, e.g., *State ex rel. Thornton v. Hay*, 317 Ore. 131, 854 P.2d 449 (1993).

<sup>11</sup> Throughout this article, I have used the term "Britain" as the subject of study. Great Britain, which comprises England, Wales and Scotland, is technically only a part of the political entity, the United Kingdom, which also includes Northern Ireland. However, many of the laws and regulations to which this comparative study refers apply only to England and Wales. Therefore, the reader should be aware that procedures, laws, and the names of the agencies involved may differ in Scotland and Northern Ireland. In most instances, I have not noted those distinctions, because they are not relevant to my purpose and would unnecessarily complicate the article.

<sup>12</sup> Countryside and Rights of Way Act 2000, avail. at <http://www.opsi.gov.uk/Acts/acts2000/20000037.htm>.

<sup>13</sup> Downland is defined as "unimproved grassland with scattered scrub." Countryside Agency, Mapping Methodology.

<sup>14</sup> See Marion Shoard, A RIGHT TO ROAM: SHOULD WE OPEN UP BRITAIN'S COUNTRYSIDE? 1-2 (1999) (British have "fierce attachment to their countryside," which is part of the country's "collective identity").

English literature, from the poetry of William Cowper,<sup>15</sup> John Clare,<sup>16</sup> Thomas Hardy,<sup>17</sup> and William Wordsworth<sup>18</sup> to the novels of Jane Austen.<sup>19</sup> Numerous public footpaths crisscross private lands and both the government and private groups such as the Ramblers Association zealously guard these rights-of-way against encroachment.<sup>20</sup> Under a theory of implied dedication, British courts have consistently recognized the public right to enjoy common rights to certain private lands historically used by the citizenry.

But these rights, as extensive as they may seem to outsiders, have never satisfied the British public, due primarily to class outrage with an historical basis. The burr under the saddle of public access rights occurred during the enclosure period.<sup>21</sup> As more fully explored below, enclosure converted communal land into private land, profoundly affecting commoners' rights and English society in general. Although many public footpaths were preserved by enclosure orders, the public's access to many areas over which they previously enjoyed a general right to roam was summarily extinguished.

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<sup>15</sup> See, e.g., Tim Fulford, "Cowper, Wordsworth, and Clare: The Politics of Trees," 14 JOHN CLARE SOC'Y J. 47 (1995) (available at [www.johnclare.info](http://www.johnclare.info)) ("Cowper found in the landscapes of Buckinghamshire the virtues he had sought and failed to find in polite society. They were for him places from which order, morality, even love could be derived when it could not from the actions of gentlemen.")

<sup>16</sup> Populist poet John Clare (1793-1864) often wrote of the joys of the countryside and its importance to the common man. See, e.g., John Clare, "The Flitting," in *Poems*, Vol. II, at 252 (quoted below at n. \_\_\_\_).

<sup>17</sup> Although Hardy may be more well-known for his novels, he was also a celebrated poet. Many of his poems reflect a love for nature and the joys of walking in the countryside. For example:

I went by footpath and by stile  
Beyond where bustle ends,  
Strayed here a mile and there a mile  
And called upon some friends.

Thomas Hardy, "Paying Calls," lines 1-4, in *MOMENTS OF VISION AND MISCELLANEOUS VERSES* (1919).

<sup>18</sup> See, e.g., William Wordsworth, "Lines Composed a Few Miles Above Tintern Abbey," (1798) (discussed below at n. \_\_\_\_).

<sup>19</sup> See, e.g., Jane Austen, *PRIDE AND PREJUDICE*, Ch. VII, discussed below at n. \_\_\_\_; *MANSFIELD PARK*, at 87 (T. Tanner ed. 1985) (lamenting landowner's destruction of trees).

<sup>20</sup> Ramblers Association website, [www.ramblers.org.uk](http://www.ramblers.org.uk) (claiming 140,000 members).

<sup>21</sup> As discussed below, Section II.B, enclosure of common lands occurred gradually over several centuries, but the most intensive period occurred between 1700 and 1840.

The loss of these “roaming” rights seems to have been chafing at Britons ever since. Public discontent with lack of access resulted in celebrated protests, to which Parliament responded with a gradual shift back to greater access. Rather than a radical nationalization of private property rights, then, CRoW can be viewed as an attempt to regain a balance between public and private rights to land that was upset during the enclosure period.

For Americans, the study of Britain’s right to roam reminds us that there is an important cost to the recognition of an absolute right to exclude. Rather than simply accept the right to exclude as a given, courts should carefully consider the interests it serves and determine whether, in some circumstances, it may be possible to accommodate greater public access without damaging those interests. The analysis below suggests that the dramatic difference in treatment of the right to exclude can be traced to important distinctions in the two countries’ history and culture. Nevertheless, the new right to roam deserves to be recognized as a landmark, which validates important public interests that have been all but forgotten in the United States. Americans may be able to find ways to accommodate those interests in ways that take into account differences in our cultural and legal landscape.

This article will discuss the evolution of the right to roam in Britain, tracing its origins to the rights of common held before enclosure. Section II describes how the loss of roaming rights led the public first to the courts, where they gained limited access through common law doctrines such as custom and prescription. Still shut out of desired areas, roamers turned to Parliament, which responded with laws that protected the scenic beauty of the countryside and, by degrees, increased the public’s access to it. In Section

III, the article discusses in detail the most recent, and certainly the most dramatic, legislative recognition of the public's right to roam the countryside, CRoW. In addition to a discussion of the mechanics of the legislation and developments in its early application, the section will outline the public values behind the right to roam. Finally, Section IV will compare CRoW to the fierce protection of the right to exclude in the United States and how we provide access to the countryside. The article concludes that, despite significant differences in culture and history, the United States may find ways to better accommodate the important interests behind the right to roam.

## **II. Evolution of Public Access Rights in Britain**

The new "right to roam" established by CRoW can be fully understood only in the context of Britain's complex history of public access rights. Before the enclosure period, British commoners enjoyed a variety of rights to use common land, which were extinguished when the land was converted to private land. Although many footpath easements were preserved by enclosure orders, the general right to roam freely over the mountains and moors was not. The public, however, continued to fight to restore those roaming rights, first through the courts, with limited success, and then through Parliament. This section traces the loss of roaming rights and their gradual reinstatement. The section begins, however, with an examination of the footpath system, another means of public access with a basis in history.

### **A. The British Footpath System**

Green lanes that shut out burning skies  
And old crook'd stiles to rest upon;  
Above them hangs the maple tree,  
Below grass swells a velvet hill,  
And little footpaths sweet to see

Go seeking sweeter places still.<sup>22</sup>

This article will discuss two types of public access rights in Britain: footpaths and roaming rights. Footpaths are public easements over private land that are confined to a particular defined right of way. A right to roam, in contrast, is not limited to a specific path. Instead, the right to roam gives much broader access, allowing the public to wander freely over private meadows or other uncultivated private lands. Under a right to roam, a family could pick a spot on top of an escarpment or mountaintop and spread out a blanket for a picnic lunch, while the footpath easement is for travel only. Footpath easements are typically of ancient origin, while roaming rights were only recently granted in CRoW. As discussed below, however, both these public rights have historical origins.

“Footpath” is the common term used to describe a “public way,” which actually encompasses bridleways and carriageways in addition to walking paths. A footpath, the narrowest of the three types of public ways, is limited to foot-traffic only.<sup>23</sup> A bridle-way may be used for traveling either by foot or by horse, and a carriage-way or by-way may be used also by motorized vehicles, although it may not be maintained as a road.<sup>24</sup> This article will use the term “footpath” to refer generically to these public easements.

Over 130,000 miles of footpaths crisscross England and Wales<sup>25</sup> and on average each square mile of land contains 2.2 miles of public paths.<sup>26</sup> These trails, worn by countless travelers through the centuries, were historically the primary routes of

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<sup>22</sup> John Clare, “The Flitting,” in POEMS, VOL. II, at 252 (quoted in Kim Taplin, THE ENGLISH PATH, at 8 (1979)).

<sup>23</sup> Sir Robert Hunter, THE PRESERVATION OF OPEN SPACES AND OF FOOTPATHS AND OTHER RIGHTS OF WAY, at 314 (2d ed. 1902). Even bicycles are typically not allowed on a footpath. *Id.*

<sup>24</sup> *Id.*, at 313-14.

<sup>25</sup> “Ramblers Protest the ‘National Disgrace’ of Britain’s Footpaths,” The Independent (Apr. 9, 2000), available on-line at <http://www.millennium-debate.org/indsun9ap4.htm>.

<sup>26</sup> Shoard, *supra* n. \_\_, at 17.

communication between villages.<sup>27</sup> Before automobiles were invented, of course, everyone except the gentry had to journey by foot or horseback on these trails, which certainly pre-date the roads built to accommodate vehicular traffic. Footpaths led to the mills, to the churches, to the springs, to the lakes or coast, anywhere that people wanted or needed to go.<sup>28</sup> On market days, villagers from all of the surrounding hamlets, laden with goods to sell, used footpaths to reach the market town.<sup>29</sup>

Remarkably, many of these paths formed by centuries of use remain in existence today. Some footpaths span long distances, taking the walker through the pages of history. For example, the Cotswold Way, a 100-mile trek from the ancient Roman city of Bath to the historic market town of Chipping Campden, travels along the edge of an escarpment, offering dramatic views of sheep grazing in fields lined by stone walls in the valley below.<sup>30</sup> The path links picturesque villages, filled with buildings of yellow Cotswold stone. A day's walk may take you through the ruins of an ancient Abbey,<sup>31</sup> past a castle frequented by Queen Katharine Parr and King Henry VIII,<sup>32</sup> and then to a burial chamber or "long barrow" dating from the Stone Age.<sup>33</sup>

Hadrian's Wall Path runs along the entire eighty-mile site of the ancient stone wall built on the order of Emperor Hadrian in AD 122 to repel Barbarian invasion. The Thames Path stretches 184 miles along the well-known river, from the middle of London to the quiet Cotswold countryside. Several coastal paths run hundreds of miles along

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<sup>27</sup> See Taplin, *supra* n. \_\_\_, at 1 (paths important for communication, but also for providing "mental landscapes").

<sup>28</sup> Taplin, *supra* n. \_\_\_, at 3.

<sup>29</sup> William Howitt, *THE RURAL LIFE OF ENGLAND*, pt. II, Ch. 1 (1838), cited in Taplin, *supra* n. \_\_\_, at 47-48.

<sup>30</sup> See Countryside Agency, National Trails website, at [www.nationaltrail.co.uk](http://www.nationaltrail.co.uk).

<sup>31</sup> The ruins of Hailes Abbey, founded in 1246, are located on the Cotswold Way near Winchcombe. *Id.*

<sup>32</sup> Sudeley Castle, on the Cotswold Way near Winchcombe. See [www.sudeleycastle.co.uk](http://www.sudeleycastle.co.uk).

<sup>33</sup> Belas Knap, which dates from 3000 B.C, is also near Winchcombe. See <http://britannia.com/wonder/belas.html>

cliffs and through fishing villages. In Wales, Glyndwr's Way runs 132 miles through a spectacular variety of terrain, from wild hill country to river valleys, moors and woodlands.<sup>34</sup>

Of course, there are many miles of footpaths that are not as renowned or spectacular, but equally as useful in allowing the rural residents to walk to town, to the grocery store or the pub, or conversely to allow the town dweller to walk the dog (or themselves) in the fresh air and sunshine without worrying about traffic. During my recent stay at a country cottage in Britain, three footpaths passed within 100 yards of the front door, allowing me to walk to several neighboring villages.

The signal characteristic of these footpaths, and what sets them apart from most trails in the United States, is that they are almost entirely on private lands. A walker may climb a stile over a fence, or walk through a kissing gate,<sup>35</sup> and follow a path right through a farmer's rye field or through a meadow full of grazing sheep. Under British law, the landowner is prohibited from interfering with this right of way or discouraging public use of it. Even posting a sign such as "Beware of the Bull" can be deemed an impermissible means of discouraging foot traffic. If an owner wishes to divert the path, to build a new structure or for farming reasons, for example, the landowner must obtain a diversion order. The diversion will be approved only if another pathway is provided that is not "substantially less convenient" for the public.<sup>36</sup>

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<sup>34</sup> For general information on the walking paths of Britain, see [www.visitbritain.com/walking](http://www.visitbritain.com/walking) or the website of the Ramblers Association, [www.rambler.org.uk](http://www.rambler.org.uk).

<sup>35</sup> A "kissing gate" is a gate that swings in an enclosure, so that only one person can go through at a time and animals cannot escape. It is apparently so named because the first person through the gate can demand a kiss to swing the gate back to let the next person through. Who knew hiking could be so much fun?

<sup>36</sup> Section 119(6), Highways Act 1980 (must also consider the effect on public enjoyment of the path).

A recent case illustrates how seriously the British take their footpaths.<sup>37</sup> A golf course developer started to build a clubhouse directly over a footpath, without having obtained a diversion order. The local council confirmed the public's right to use the path and the developer was forced to provide hardhats to the citizens as they continued to tramp right through the construction site. The conflict was resolved after the developer applied for a diversion and had the path moved to another location. In another case, Andrew Lloyd Webber attempted to divert a footpath that ran between his house and office, but the inspector rejected the application because he felt that the diversion would disadvantage the public, by lengthening the path and lessening its visual amenities, which he thought outweighed Sir Andrew's concerns.<sup>38</sup>

The roots of these access rights can be traced to the medieval feudal system. While the lord of the manor retained ownership of village lands, the villagers enjoyed complex and varied rights to use common land.<sup>39</sup> Rights to the commons included the right to graze a certain number of animals, to take wood from the forests for heat or for house repairs, or to take rock or gravel.<sup>40</sup> And certainly, commoners could walk or ride freely over the common or wastelands of the lord; frequently used routes developed into footpaths and bridleways.<sup>41</sup>

When the land was later enclosed and common rights largely extinguished, many footpath rights of way survived, either by the enclosure order itself, or under the doctrines

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<sup>37</sup> Shirley Skeel, "Rambling and Roaming Rights in England: Walkers Rush to Meet Mapping Deadlines," 19 CALIFORNIA COAST AND OCEAN (2003), avail. at <http://www.coastalconservancy.ca.gov/coast&ocean/spring2003/pages/three.htm>.

<sup>38</sup> Shoard, *supra* n. \_\_, at 197.

<sup>39</sup> G.M. Trevelyan, ENGLISH SOCIAL HISTORY, at 35-37 (1944)

<sup>40</sup> *Id.* See also Sir Robert Hunter, THE PRESERVATION OF OPEN SPACES AND OF FOOTPATHS AND OTHER RIGHTS OF WAY (2d ed. 1902).

<sup>41</sup> Some footpaths date back to Roman times, at least. See Anthony Burton, HADRIAN'S WALL PATH: NATIONAL TRAIL GUIDE (2003)(noting Roman milestone on the footpath to Vindolanda).

of dedication or prescription. The lord, having allowed the public passage over the land since time immemorial, was presumed to have dedicated the path to the public or to have lost the right to object due to the passage of time.<sup>42</sup> These doctrines, of course, require proof that a specific, defined right of way was so used; neither the courts or the enclosure orders granted a more generic right to roam. The next section more fully describes the effects of this enclosure period on public access.

## **B. Impact of Enclosure on Access Rights**

The fault is great in man or woman  
Who steals a goose from off a common;  
But what can plead that man's excuse  
Who steals a common from a goose?<sup>43</sup>

The enclosure of the commons, which extinguished common rights as it converted land into private property, completely transformed British society. Enclosure took place over four centuries, with the most activity occurring between 1700 and the mid-1800s.<sup>44</sup> Parliament enacted the first enclosure act in either 1545 or 1606, but most enclosure was by agreement of the parties until the 1700s.<sup>45</sup> In the early eighteenth century, parliamentary enclosure picked up steam: Parliament passed 280 acts enclosing particular areas between 1700 and 1760, and passed nearly 4,000 such acts between 1760 and

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<sup>42</sup> Hunter, *supra* n. \_\_\_\_, at 316 (citing *Poole v. Huskinson*, 11 M. & W. 830 (1843) and *Eyre v. The New Forest Highway Board*, 56 J.P. 517 (1892)).

<sup>43</sup> The Tickler Magazine (Feb. 1, 1821), quoted in THE OXFORD UNIVERSITY PRESS DICTIONARY OF QUOTATIONS, at 10 (2d ed. 1953).

<sup>44</sup> J.M. Neeson, COMMONERS: COMMON RIGHT, ENCLOSURE AND SOCIAL CHANGE IN ENGLAND, 1700-1820 (1993), at 5 (I used the paperback edition, 1996).

<sup>45</sup> Frank A. Sharman, *An Introduction to the Enclosure Acts*, 10 J. LEG. HIST. 45, 47 (1989).

1840.<sup>46</sup> This latter stage of parliamentary enclosure has provoked the most inquiry into the fairness of its impact on commoners.<sup>47</sup>

Typically, Parliament justified enclosure by an appeal to the national interest. The commons system, according to those favoring enclosure, had resulted in an untenable situation, including such problems as “the insubordination of commoners, the unimprovability of their pastures, and the brake on production represented by shared property.”<sup>48</sup> Historians generally agree that enclosure brought more land into production and improved the economy overall by increasing economies of scale and reducing the inefficiency caused by multiple tenants.<sup>49</sup> However, enclosure came at a heavy price to the commoners.

Common rights were a complex system of land utilization. Villagers who owned common rights in the arable fields also might be entitled to graze a certain number of animals on the common pasture.<sup>50</sup> Certain cottages might also have the right to pasture attached to their occupancy. But even landless commoners could enjoy the use of the manor’s wasteland.<sup>51</sup> For example, they could take fuel, including not only wood, in

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<sup>46</sup> Sharman, *supra* n. \_\_, at 48. In addition to parliamentary enclosure, land was also enclosed by private agreement, which makes study of the subject even more complicated. See Gregory Clark and Anthony Clark, “Common Right in Land in England, 1475-1839,” 61 J. OF ECON. HIST. 1009 (2001) (attempting to estimate amount of common land based on statistical study, discussing complexity of enclosure).

<sup>47</sup> Maria Ågren, “Asserting One’s Rights: Swedish Property Law in the Transition From Community Law to State Law,” 19 L. & HIST. L. REV. 241, 243 n.8 (2001)(citing both favorable and unfavorable treatments of this enclosure period).

<sup>48</sup> Neeson, *supra* n. \_\_, at 7.

<sup>49</sup> Ellickson, *supra* n. \_\_, at 1392. See also George Wingrove Cooke, THE ACTS FOR FACILITATING THE ENCLOSURE OF COMMONS IN ENGLAND AND WALES WITH A TREATISE ON THE LAW OF RIGHTS OF COMMONS, at iv (2d ed. 1850)(the right of common is one of the “conditions of tenure which condemn the land to perpetual sterility” because of its inefficiency)(quoting Paley, PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY, ch. xi, sec. 6 (1785)).

<sup>50</sup> Neeson, *supra* n. \_\_, at 59.

<sup>51</sup> The term waste referred to lands that were at best marginally useful for agricultural production or grazing. Clark and Clark, at 9. The extent of wasteland depended, therefore, on the economic value of the crop and agricultural methods. As crops became more valuable and techniques for bringing land into production improved, lands that were previously thought to be waste became more valuable. Bogs or fens previously held to be waste, for example, were later drained to bring them into production.

forested areas, but also turf, gorse, bracken, and peat in other areas.<sup>52</sup> Commoners gathered fruit and nuts on wasteland, as well as herbs and roots.<sup>53</sup> Landless commoners could also enjoy the right to turn out their pigs or geese into the fields after harvest in order to glean the remaining grain.<sup>54</sup> Hunting rights, for deer or rabbit, were also valuable to commoners.

The origins of these commons rights are ancient and somewhat obscure. Although the lord owned the land according to royal grant or proclamation, necessity required him to allow the villagers to make use of some of it, especially those lands which the lord found to be of little economic value – the “waste” lands. As long as land was more abundant than people, the system worked nicely.

So long as the population was scanty, land was too abundant to be cultivated for pasture. After as much as the population could till had been parceled out, with a reservation of services, there was still a large remaining waste, upon which the cattle used in tillage might pasture. The waste was the lord’s but its extent was beyond his power of occupation, and the tenants of his arable lands used it until he chose to reclaim it.<sup>55</sup>

But the custom arose as much from the public need as it did from the lord’s economic surplus. The Statute of Merton in 1235 allowed the Lord of the Manor to enclose his waste, to some extent, but required him to leave enough of the waste “for the needs of his tenants,” and the right was further burdened by recognition of the commoners’ rights of pasture.<sup>56</sup> While fee title might belong to the lord, the land was burdened by public

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<sup>52</sup> Neeson, *supra* n. \_\_\_, at 159. Wood could also be taken for building or repairing houses or barns. *See also* Fred P. Bosselman, “Limitations Inherent in the Title to Wetlands at Common Law,” 15 STAN. ENV. L. J. 247, 265-70 (1996) (describing value of commoners’ multitude of uses of English fens and wetlands, which were destroyed by enclosure).

<sup>53</sup> Neeson, *supra* n. \_\_\_, at 169-70.

<sup>54</sup> Peter King, “Customary Rights and Women’s Earnings: The Importance of Gleaning to the Rural Labouring Poor 1750-1850,” 44 ECONOMIC HISTORY REVIEW 461, 461 (1991).

<sup>55</sup> Cooke, *supra* n. \_\_\_, at 4.

<sup>56</sup> Hammonds, *supra* n. \_\_\_, Ch. 1.

servitudes said to have their origins in concessions made to the commoners “in remote antiquity.”<sup>57</sup> Thus, commons rights represented a mediation between the needs or demands of the gentry and those of the lower classes, which enclosure threatened to upset.

There are countless explanations and analyses of why enclosure occurred. The economic explanation is simply that land became scarcer and agricultural prices higher. Until then, the gentry had tolerated common rights because it was not worth the cost to enclose the lands. As innovations in agricultural practices made farming larger tracts feasible, the benefits of enclosure began to outweigh the costs.<sup>58</sup> Moreover, consolidating the land ownership into one owner rather than dozens or hundreds of common rightholders allowed for more efficient decisionmaking.<sup>59</sup>

Under the parliamentary enclosure system, as it developed, any landowner could petition Parliament to initiate enclosure.<sup>60</sup> Although the petition could be opposed by the commoners, successful opposition would require the poor to somehow acquire the wherewithal to oppose powerful landed interests. Few commoners would be able to afford representation or travel to London to present their complaints against enclosure.<sup>61</sup> Even if they did, commoners would have little chance of succeeding against the more

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<sup>57</sup> Hammonds, *supra* n. \_\_, Ch. 1.

<sup>58</sup> George Wingrove Cooke, *supra* n. \_\_, at iv (expense of enclosure formerly not worth the cost). Cooke argued that the basis for common rights was not legal in nature, but practical: “It has always been co-existent with the disproportion of land to population; it grows restricted as that disproportion decreases; and it must every where disappear when that disproportion ceases.” *Id.* at 1. Similarly, the open range was enclosed in the American west only when barbed wire decreased the cost of fencing.

<sup>59</sup> Cooke, *supra* n. \_\_, at 2 (rights of common preclude owner from improving or making economic use of his land). Cooke refers to the dispute between Abraham and Lot, concerning overgrazing caused by both of their cattle herds trying to graze the same fields, as the first commons conflict. Cooke, at 3 (citing Genesis 13:6).

<sup>60</sup> Sharman, *supra* n. \_\_, at 49.

<sup>61</sup> J.L. and B. Hammond, *THE VILLAGE LABOURER*, at 37-39 (1966 ed).

politically powerful gentry.<sup>62</sup> Protests did occur, however, including the burning of fenceposts and rioting.<sup>63</sup>

Upon the enactment of an enclosure act, Parliament appointed commissioners to allocate the lands to be enclosed. The commissioners allotted lands to the Lord of the Manor, to tithe-holders, and to those who owned land in the common fields. In at least some instances, the allocation set aside land for the use of the poor.<sup>64</sup> In the enclosure orders, the commissioners typically set out roads and footpaths to be recognized over the enclosed lands.<sup>65</sup>

However, landless commoners and those with small allotments were profoundly affected by enclosure and the loss of common rights. Enclosure basically extinguished the village economy, in which many peasants eked out an existence on common lands and thereby could remain independent. Those who lost common rights, sometimes half of the villagers, sometimes more,<sup>66</sup> were not compensated adequately, or even at all.<sup>67</sup> The right to gather fuel or to turn geese or pigs out into the field for gleaning, for example, was simply lost overnight. Although some peasants turned to the courts to vindicate their common rights, those attempts were unsuccessful.<sup>68</sup> The poor, in essence,

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<sup>62</sup> While one would expect the House of Lords to be dominated by aristocrats, the vast majority of members of the House of Commons were also landowners. See G.M. Trevelyan, *ENGLISH SOCIAL HISTORY*, at 286-87 (in *Restoration England*, 90% of House of Commons members were landowners)(Pelican ed., 1967).

<sup>63</sup> Neeson, *supra* n. \_\_, ch. 9, pp. 259 ff. (documenting protests illustrating “deep hostility” toward enclosure, which was “corrosive of social relations,” *id.* at 291); Bosselman, at 301 (describing violence directed against fen drainage projects).

<sup>64</sup> Sharman, *supra* n. \_\_, at 59, 65; Neeson, *supra* n. \_\_, at 174.

<sup>65</sup> Sharman, *supra* n. \_\_, at 59.

<sup>66</sup> Neeson, *supra* n. \_\_, at 61, 72-73.

<sup>67</sup> Neeson, *supra* n. \_\_, at 16, 47-52 (citing E.C.K. Gonner, *COMMON LAND AND INCLOSURE*, 362-6 (1912, 2d ed. 1966); Bosselman, *supra* n. \_\_, at 301 (statutes authorizing drainage and enclosure of fens “made only minimal attempts to protect the interests of the commoners)).

<sup>68</sup> For example, in *Steel v. Houghton et Uxor*, 1 H.Bl. 51, English Reports (C.P.), 126:32-39 (1788), the court refused to grant a common law right to glean, finding that gleaning rights would be “inconsistent with the nature of property which imports absolute enjoyment.” The author of the main opinion, Lord

became poorer, “surrounded by hether (sic) they dare not collect, and by a profusion of turnips they dare not pluck.”<sup>69</sup> Even those allotted small landholdings in the enclosure found it difficult to continue, because of the cost of enclosure and the loss of common rights that supported their small operations.<sup>70</sup>

Virtually overnight, peasants who had been able to earn a living independently became desperate for a wage-earning job. The new supply of laborers became the fodder to fuel the Industrial Revolution. Even the simple loss of gleaning rights, which allowed a peasant’s pigs and ducks to fatten in the fallen grain after harvest, could force a commoner from the land and into the labor force.<sup>71</sup>

The loss of independence caused by the shift to a labor economy was decried by many who were now “utterly dependent on miserable wages.”<sup>72</sup> In the words of poet John Clare, enclosure “came and trampled on the grave, of labour’s rights and left the poor a slave.”<sup>73</sup> Just as Thomas Jefferson believed that liberty depended on a nation of independent landowners, British commentators have noted that the independence of the commoner, “the most precious gift of a free nation,” was one of most important casualties of enclosure.<sup>74</sup>

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Loughborough, of course, was himself a member of the landed gentry. See Neeson, *supra* n. \_\_, at 56-57; Peter King, “Legal Change, Customary Right, and Social Conflict in Late Eighteenth-Century England: The Origins of the Great Gleaning Case of 1788,” 10 LAW & HIST. REV. 1 (1992).

<sup>69</sup> *The Torrington Diaries. A Selection from the Tours of the Hon. John Byng (later Fifth Viscount Torrington) between the years 1782 and 1794*, at 505-06 (C. Bruyn Andrews, ed. 1954), *quoted in* Neeson, *supra* n. \_\_, at 47 n.92.

<sup>70</sup> Sharman, *supra* n. \_\_, at 66-67; Neeson, *supra* n. \_\_, at 22 (enclosure “impoverished twenty small farmers to enrich one”).

<sup>71</sup> King, “Gleaning Case,” *supra* n. \_\_, at 24, 29-31 (loss of gleaning rights contributed to the “proletarianization” of rural poor).

<sup>72</sup> Neeson, *supra* n. \_\_, at 14;

<sup>73</sup> John Clare, “The Mores,” in *SELECTED POEMS AND PROSE*, at 170.

<sup>74</sup> Neeson, *supra* n. \_\_, at 45.

In addition, the loss of common rights had a larger social impact. Many elderly villagers had been effectively supported by the young who worked and shared the wealth of common fields and pastures; with enclosure, the elderly were now left to fend for themselves.<sup>75</sup> The poor, who had been able to survive on the common rights, were now forced to try to find scarce work, and relations between the classes became strained and tainted with resentment.<sup>76</sup> Owning a common right gave all of the villagers a connection to the land and to each other that was lost with enclosure. The system of communal property may have been inefficient, and its demise may have been inevitable, but we should not overlook the social side of the equation. Communal property often created a community fabric made up of social relationships that contributed to well-being in ways that do not show up on the balance sheets.<sup>77</sup>

Moreover, even if enclosure was more efficient, scholars roundly condemn its fairness. Enclosure appears to have been a legislatively sanctioned reallocation of property rights from commoners to the landed gentry.<sup>78</sup> More succinctly, E.P. Thompson called it “class robbery.”<sup>79</sup> Prior to enclosure, the poor had come to depend on common rights, taking them “to be as much their property, as a rich man’s land is his own.”<sup>80</sup> Enclosure extinguished those rights, for the most part without compensation.

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<sup>75</sup> Neeson, *supra* n. \_\_, at 198-99.

<sup>76</sup> *Id.*, at 256-57.

<sup>77</sup> Banner, “Commons,” *supra* n. \_\_, at 90-93 (people may value owning things in common “as an end in itself”; value of collective self-government).

<sup>78</sup> Fred Bosselman refers to the redistribution from commoners to gentry during enclosure as “rent-seeking.” Bosselman, *supra* n. \_\_, at 247.

<sup>79</sup> E.P. Thompson, *THE MAKING OF THE ENGLISH WORKING CLASS* 218 (1963).

<sup>80</sup> Daniel Defoe, *A TOUR THROUGH THE WHOLE ISLAND OF GREAT BRITAIN*, 1724-26, II, at 15-16 (1962 ed.), quoted in Neeson, *supra* n. \_\_, at 107. Interestingly, at about this same time, the movement away from common rights toward more absolute private property arrangements, and the resulting redistribution of wealth, was also occurring in India, see V.A. Smith, *THE OXFORD HISTORY OF INDIA* (4<sup>th</sup> ed. 1982), at 534-36, and in France, William H. Sewell, Jr., *WORK AND REVOLUTION IN FRANCE: THE LANGUAGE OF LABOR FROM THE OLD REGIME TO 1848*, at 114, 134 (1980) (describing common rights destroyed by Revolution in favor of absolute property ownership).

In praising enclosure as a prime example of the economic efficiency of private property as opposed to the common pool, some modern scholars seem to have glossed over the redistributive impacts of the allocation. In his seminal article, “Property in Land,” for example, Professor Ellickson notes: “It is now widely agreed, however, that, at least after 1700, enclosures in England were usually scrupulously fair to smallholders, who received new lands in rough proportion to the value of their prior rights.”<sup>81</sup> For this supposed wide agreement, Ellickson cites only Sharman, who actually concludes after a brief review that “it is not at present possible to pass judgment” on the fairness of parliamentary enclosure.<sup>82</sup> In his one-page analysis of the “general effects” of enclosure, Sharman notes the dramatic impact on the poor, who got “little or nothing” out of enclosure and on small landowners, whose allotments were so small as to be commercially impracticable to farm.<sup>83</sup> Ellickson does concede that laborers lost out in enclosure, because they received no allotments and lost their common rights, but concludes that “most villages appear to have regarded the last waves of enclosures as welcome reprieves from archaic land tenure arrangements.”<sup>84</sup> This analysis of enclosure thus appears to be skewed to minimize enclosure’s costs, perhaps to more fully support a theory that favors private ownership over communal ownership of property.

Although one can certainly argue that consolidation of land ownership was more economically efficient, the unfairness of this property redistribution cannot be so easily

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<sup>81</sup> Ellickson, *supra* n. \_\_, at 1392.

<sup>82</sup> Sharman, *supra* n. \_\_, at 50 (the page Ellickson cites, page 47, actually makes no mention of the fairness of enclosures).

<sup>83</sup> Sharman, *supra* n. \_\_, at 67.

<sup>84</sup> Ellickson, Property in Land, *supra* n. \_\_, at \_\_\_\_\_. Interestingly, while elsewhere Ellickson has extolled the virtues of property rights systems based on custom, see Robert C. Ellickson, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991), he fails to note that enclosure ran counter to a very well-entrenched system of customary property rights. See Ågren, “Asserting One’s Rights,” *supra* n. \_\_, at 244 (pre-enclosure property rights based on “commonly accepted norms pertaining to the use of land”).

swept under the rug. In fact, although historians may debate the impact enclosure caused,<sup>85</sup> the consensus is closer to the view of Christopher Hill, who states that “enclosure brought untold suffering to countless numbers of English men, women and children.”<sup>86</sup> Stuart Banner notes that enclosure favored the politically powerful, while the poorest commoners often got nothing.<sup>87</sup> Neeson’s recent careful analysis of peasant life and the effects of enclosure concludes that enclosure destroyed a whole class—the English peasantry – and along with it the “social cement” that bound the village together.<sup>88</sup>

The reallocation of property rights that occurred during enclosure is one of the great case studies of what property rights truly are and how they arise. For centuries, the public had enjoyed rights of common on the lands of the lord. Then, suddenly, those rights were extinguished. In some cases, some compensation was given to those who lost common rights, but the paltry sums offered could not begin to make up for the rights upon which many commoners desperately depended.

Banner calls enclosure an example of a transition from a “functional” system, in which various people have rights to do things on a particular piece of ground, to a “spatial” system of absolute ownership of certain territory.<sup>89</sup> The recognition of a public right to roam then, represents a return to a more functional approach, in which the landowner’s rights exist alongside the public’s use of the land for wandering. While Britain will never return to common fields and gleaning rights, granting the public greater

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<sup>85</sup> See, e.g., Clark and Clark, *supra* n. \_\_\_, who argue that the vast majority of common lands were not truly communal in the sense of free access to all.

<sup>86</sup> Christopher Hill, *REFORMATION TO INDUSTRIAL REVOLUTION*, at 69 (1969), quoted in Sharman, at 67.

<sup>87</sup> Banner, “Transitions,” *supra* n. \_\_\_, at 368.

<sup>88</sup> Neeson, *supra* n. \_\_\_, at 46.

<sup>89</sup> Banner, “Transitions,” *supra* n. \_\_\_, at 369. See also Shoard, *supra* n. \_\_\_, at 115-16 (discussing Aristotle’s vision of private property ownership with communal use).

rights of access to private property must be viewed against the backdrop of this history. Thus, CRoW may be seen as simply a step toward restoring to the public what it lost during enclosure.

### **C. Limited Common Law Rights of Access**

The first attempts to regain common rights of access came through the common law. After enclosure, commoners increasingly asked courts to recognize as legitimate their use of enclosed lands. With regard to public access, the common law favored the continued right to use footpaths, under certain circumstances, but failed to recognize a more general right to roam.

Enclosure obviously threatened to extinguish not only common rights, but also the paths used by commoners to reach the village or other towns. Sometimes the special commissioners appointed under an enclosure act would explicitly include a public right of way in their award.<sup>90</sup> In many cases, however, public use of the footpath simply continued until challenged by the landowner, and the case was then decided in court.<sup>91</sup>

In that case, courts would apply the common law doctrine of prescription, for private easements, or implied dedication, for public uses, to determine whether the right of way would be granted. These doctrines required proof that the path had been used from "time immemorial;" if so, under the fiction of the "lost grant," the right of way could not be extinguished.<sup>92</sup> Originally, the period of adverse use had to date from the reign of a particular monarch. Under the Statute of Merton (1235), for example, the date

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<sup>90</sup> Hunter, *supra* n. \_\_\_, at 317.

<sup>91</sup> *Id.*, at 317-18.

<sup>92</sup> *Fitzpatrick v. Robinson*, 9 G.IV. 585 (1828); *Bryant v. Foot*, L.R. 2 Q.B. 161, 181 (1867).

was the accession of Henry II (1154), later advanced to the accession of Richard I in 1189 by the Statute of Westminster (1275). The Limitation Act 1623 fixed a twenty-year period of limitation for actions for ejectment and thereafter judges began using that period by analogy as raising a presumption of enjoyment since 1189.<sup>93</sup> Under the 1832 Prescription Act, Parliament statutorily confirmed the 20-year period for private easements by prescription.<sup>94</sup> The Rights of Way Act 1932 prescribed the identical period for public easements by implied dedication.<sup>95</sup>

Commoners sought to maintain many other public uses of the commons, aside from footpaths, including use of the village greens for recreation.<sup>96</sup> Again, courts would uphold the villagers' claims if well-established by custom, which was basically a variant of the theories behind dedication or prescription.<sup>97</sup> The public uses upheld ranged from dancing,<sup>98</sup> to horseracing,<sup>99</sup> to playing cricket.<sup>100</sup> Eventually, this doctrine of custom was incorporated into a statute seeking to settle these claims by registering public spaces as village greens.<sup>101</sup>

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<sup>93</sup> For an excellent summary of the history of easements by prescription, see *Regina v Oxfordshire County Council* [2000] 1 A.C. 335, 354 (H.L. 1999)(appeal taken from Eng.)(public's state of mind irrelevant in determining whether implied dedication exists), avail. at [www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990624/sun.htm](http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990624/sun.htm).

<sup>94</sup> Charles James Gale, *A TREATISE ON THE LAW OF EASEMENTS* (2d ed. 1849), at 98-99.

<sup>95</sup> Rights of Way Act 1932, § 1(1).

<sup>96</sup> See generally, Charles I. Elton, *A TREATISE ON COMMONS AND WASTE LAWS* (1868), at 285-88.

<sup>97</sup> *Id.*, at 285 (“Rights of recreation and exercise may be claimed either under a custom or a grant, but not by prescription”).

<sup>98</sup> *Abbott v. Weekly*, 1 Lev. 176 (1665)(dancing on village green allowed).

<sup>99</sup> *Mounsey v. Ismay*, 1 Huelst. & Coltm. 729 (1863) (horse-racing allowed).

<sup>100</sup> *Fitch v. Rawling, Fitch & Chatheiss*, 2 H.Bl. 393-9, 3 R.R. 425 (1795) (cricket matches allowed).

<sup>101</sup> See Commons Registration Act of 1965, Section 22(1), defining a village green (which would allow public use) to include any land “on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes” or land “on which the inhabitants of any locality have indulged in such

The public uses upheld by custom, prescription, or dedication, however, did not extend to a public right to roam.<sup>102</sup> In one seminal case, *Blundell v. Catterall*,<sup>103</sup> the court declined to allow a general common law right of public access to seashores over private lands. The defendant was an employee of a hotel in Great Crosby, a village on the River Mersey (an arm of the Irish Sea), who earned money by taking hotel guests down to the water in bathing machines.<sup>104</sup> The Lord of the Manor, over whose lands the defendant had to pass, objected to this practice and sued for trespass. The hotel employee did not rely on prescription or custom, because although citizens had crossed the land for many years on foot, crossing with bathing machines was a relatively recent practice. The court held that it could not grant a general common law right of public access, apart from custom and prescription, and it refused to engage in a balancing approach to access rights:

[P]ublic convenience must in all cases be viewed with due regard to private property, the preservation of which is one of the distinguishing characteristics of the law of England. It is true that property of this description is in general of little value to its owner. But if such a general right as is claimed should be established, it is hard to know how that little is to be protected, much less increased. . . . Many of those persons who reside in the vicinity of wastes and commons walk or ride on horseback in all directions over them for their health and recreations. . . . yet no one ever thought that any right existed in favour of the enjoyment, or that any justification could be pleaded to an action at the suit of the owner of the soil.”<sup>105</sup>

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sports and pastimes as of right for not less than 20 years." *See, e.g., Reg. v. Oxfordshire County Council*, *supra* n. \_\_\_\_.

<sup>102</sup> Elton, *supra* n. \_\_\_, at 289 (“the general public has no such rights by the common law, and cannot claim them by particular custom”; the use of waste lands for exercise and recreation “raises no presumption of an abandonment of any private rights by the owners”).

<sup>103</sup> 5 B. & Ald. 268 (1821).

<sup>104</sup> Bathing machines were little huts on wheels, which could be rolled into the water. Victorian bathers could enter the machine in regular clothes on shore, change into a bathing suit and then be wheeled into the water, which they could enter without anyone ever seeing them in an improper state of dress. The machines were quite popular in the 19<sup>th</sup> century and remained in use until around World War I. Wikipedia, at <[en.wikipedia.org/wiki/Bathing\\_machine](http://en.wikipedia.org/wiki/Bathing_machine)>.

<sup>105</sup> 5 B. & Ald. . at 313-315.

Thus, the court found that establishing a right to public access, very similar to that granted by CRow some 180 years later, would be “inconsistent with the nature of permanent private property.”<sup>106</sup>

In dissent, Justice Best would have found a common law right, noting that “free access to the sea is a privilege too important to Englishmen to be left dependant on the interest or caprice of any description of persons.”<sup>107</sup> Justice Best noted the public benefits associated with bathing (health, primarily, but also learning to swim), which use of a bathing machine furthered.<sup>108</sup> More generally, he emphasized the public interest in navigation, which free passage to the seashore promoted. Best believed that the common law had to adapt to further the public’s current needs: “As law is a just rule fitted to the existing state of things, it must alter as the state of things to which it relates alters.”<sup>109</sup>

Thus, for Justice Best, the proper distribution of property rights between the private and public owners was not a formalistic exercise, but rather a balance struck by weighing social policy concerns.<sup>110</sup> Even though some members of the majority also discussed the balance of interests, they struck the balance differently. Those justices placed far greater weight on the interests of the private owner, believing that granting a general common law right of access would render private property meaningless. Conversely, the public side of the balance carried less weight as those members believed that, in general, the public had sufficient access to beaches through either customary or prescriptive rights, or through the permissive use of private owners. Where there was

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<sup>106</sup> 5 B. & Ald. at 299 (Holyroyd, J.).

<sup>107</sup> *Id.* at 275 (Best, J.).

<sup>108</sup> *Id.* at 278-79.

<sup>109</sup> *Id.* at 282.

<sup>110</sup> Justice Best also cites public trust doctrine, which makes this case interesting for those trying to use that mechanism to further public access to seashores. *Id.* at 287.

clearly no harm to the private owner, Chief Justice Abbott pointed out, the landowner is unlikely to object to public access or to bother bringing the claim to court.<sup>111</sup>

Similarly, courts disfavored the claim of a common right to roam, or *servitus spatiandi*.<sup>112</sup> For example, courts emphasized that rights cannot be established by custom that would extend to the public in general; instead, a customary right must be limited to a particular and limited class of persons.<sup>113</sup> In addition, courts feared that property owners “would virtually be divested of all open and unenclosed lands over which people have been allowed to wander and ramble as they pleased.”<sup>114</sup> Because the owner, before enclosure, had very little opportunity or economic incentive to prevent the use of wastelands for roaming, the courts found no abandonment or implied dedication.<sup>115</sup> In some cases, even though the public's use could be established, courts presumed that the use was permissive and thus no intent to dedicate could be implied.<sup>116</sup> In weighing the interests of the public versus the burden on the landowner, courts also disfavored uses classified as mere “pleasure” rather than those necessary for “health.”<sup>117</sup>

In deciding these custom cases, the English courts seemed to be struggling to strike the appropriate balance between public and private rights. One dividing line was that the custom must be “necessary.” Fishermen, for example, could properly claim the right to pitch their stakes on another’s land in order to dry their nets, if it were deemed to

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<sup>111</sup> 5 B. & Ald. 315.

<sup>112</sup> See Carol Rose, “The Comedy of the Commons: Custom, Commerce, and Inherently Public Property,” 53 U. CHI. L. REV. 711, 750-52 (1986) (analyzing rationales for denying public access).

<sup>113</sup> Elton, *supra* n. \_\_, at 290-91 (“A custom which may be extended generally to all the subjects in England, and is not warranted by the common law, but contrary thereto, is void”).

<sup>114</sup> *Id.*, at 291-92 (citing *Schwinge v. Dowell*, 2 F. & F. 845 (1862)).

<sup>115</sup> *Id.*, at 292-93 (citing *Att.-Gen. v. Chambers*, 5 Jurist. Chy. 745 (1966)).

<sup>116</sup> See, e.g., *Folkestone Corporation v. Brockman* [1914] A.C. 338.

<sup>117</sup> See *Fitch v. Rawling*, at 395 (games for “recreation and health of the inhabitants” may sustain claim of easement by custom, while those that are “merely for pleasure” are insufficient).

be necessary to do so.<sup>118</sup> This appears to be a rough attempt to determine the case on economic efficiency grounds – whether the public benefit outweighs the harm to the individual landowner, recognizing that transaction costs would likely prevent the parties from reaching the optimal result on their own.

But the courts also wanted to limit public rights claimed by custom to only a specific group of beneficiaries. In *Fitch v. Rawling*,<sup>119</sup> the defendants were charged with trespass for playing cricket on plaintiff’s lands. Although the court was quite willing to support the customary right of the local inhabitants to play sports on the property, it drew the line at allowing outsiders to join in. Justice Buller declared: “Customs must in their nature be confined to individuals of a particular description, and what is common to all mankind, can never be claimed as a custom.”<sup>120</sup> The court does not, however, give any reason for this limitation.

In *Cox v. Glue*,<sup>121</sup> perhaps aptly named for a case involving horse-racing, the court again attempted to strike a balance. In an action for trespass, the court had no problem upholding the customary right of the local citizenry to hold horse-races on the ground on the manor of Derby.<sup>122</sup> The fee-owner, by custom, did not have the right to possess the soil from July 6 to February 14, when the citizens enjoyed a common right of pasturage, and therefore the landowner could not complain about horse-back riding.<sup>123</sup> However, the fee owner also complained that defendants had erected tents, stalls, and

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<sup>118</sup> See cases cited in *Fitch v. Rawling*, 2 H. Bl. 393, 395 (1795).

<sup>119</sup> *Fitch v. Rawling*, 2 H. Bl. 393 (1795).

<sup>120</sup> *Id.* at 398.

<sup>121</sup> 5 C.B. 533 (1848).

<sup>122</sup> The Epsom Derby, England’s oldest horse race, was named after the twelfth Earl of Derby. In due time, a horse race of stature came to be called a “derby.”

<sup>123</sup> 5 C.B. at 548-553.

booths, and had thereby made holes in the soil by sinking stakes and posts.<sup>124</sup> Stressing the limitations on customary rights, the court found that the custom did not extend to disturbance of the soil and therefore the trespass action would lie.<sup>125</sup>

Again, the court made a technical distinction – preventing the citizens from “trespassing” on the soil by sinking a stake in the ground – in order to place some limits on public rights over private property. The court could have distinguished between the types of uses of the soil that had been established by custom – i.e., grazing horses is fine, but racing them is not. Presumably, however, the court did not want to become enmeshed in numerous cases alleging that a horse was ridden rather than grazed and so drew the line at a place much easier to police. In addition, an activity that disturbs the soil may be more likely to hurt the fee owner than surface activities, so economic efficiency also comes into play.

Thus, while the public was able to protect or regain some of their historic uses through common law doctrines of prescription, implied dedication, and custom, courts placed limits on those remedies to prevent their widespread use. In many cases, courts used a sort of economic balancing test to determine the extent to which they would honor the historic uses of common land. In the end, the right to roam the countryside was not recognized as important enough to justify a common law right and lands that for centuries had been open to the public for wandering were shut off by the landowner, with no recourse. Instead of gradually dissipating, however, public dismay at the loss of countryside access fermented. Increasingly, citizens turned to Parliament to provide the remedy.

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<sup>124</sup> 5 C.B. at 533.

<sup>125</sup> *Id.*

## **D. Facilitating Access Through Statutory Reform**

The public's interest in countryside is focused on two major policy areas: preservation and access. Obviously, both are equally important. Unless the beauty of rural Britain is preserved, access will become meaningless. Likewise, unless the public can enjoy the countryside, expensive measures to preserve its scenery have little value, rather like hiding a Monet in the basement.<sup>126</sup> This section describes the measures Britain has employed to preserve its countryside and then details the attempts to grant access leading up to CRoW at the turn of the century.

### **1. Land Use Controls to Preserve Scenic Values**

The British have always had a deep commitment to the countryside. While many Americans find bucolic scenes pleasant, Britain's reverence for its rural scenery rises to a much higher level. When Britons use the term "countryside," they refer to a category of land worthy of special protection. For example, the Department of the Environment calls the countryside "a national asset," which is a "priceless part of our national heritage."<sup>127</sup> The British Parliament created a special government body, Natural England, for the precise purpose of promoting and conserving the quality of rural life and the countryside itself, for the enjoyment of all.<sup>128</sup> While Americans may lament the loss of the family

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<sup>126</sup> Or Thomas Gray put it, like a flower blushing unseen, wasting its "sweetness in the desert air." Thomas Gray, "Elegy Written in a Country Churchyard."

<sup>127</sup> Department of the Environment, "Rural England: A Nation Committed to a Living Countryside," vCm 3016 (Oct. 1995), at 9, 14.

<sup>128</sup> Prior to 2006, this statutory mandate was fulfilled by the Countryside Agency. Under the Natural Communities and Rural Environment Act of 2006, these responsibilities were shifted to Natural England, a new agency that also took on the functions of English Nature, the agency which previously had responsibility for wildlife and biodiversity. See [www.countryside.gov.uk](http://www.countryside.gov.uk).

farm and attack urban sprawl, we have no similar national commitment to the countryside in general.

Because most of the land in Britain's scenic countryside is privately owned, the burden of maintaining its beauty falls mainly on individual landowners. About 80% of British property is owned privately;<sup>129</sup> in the United States, however, only around 60% of land is in private hands.<sup>130</sup> Thus, while Americans create public spaces, such as national parks, on government land, Britain is more likely to use a variety of regulatory tools that leave the land in private hands, but significantly restrict development activity.

Britain, in fact, did not create its first national park -- the Peak District -- until 1951,<sup>131</sup> long after the United States had established its first national park, Yellowstone, in 1872.<sup>132</sup> But the British concept of a national park differs significantly from the American model, in that the British park is not wholly "natural" in the sense of being insulated from human development activity. Although some areas are strictly protected as nature preserves, in most parks mining, timber cutting, farming, and grazing can be found, alongside tourist and residential development.<sup>133</sup> None of the public lands in Britain probably could be classified as "wilderness" under the American conception.<sup>134</sup>

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<sup>129</sup> "Who Does Own Britain Today?," 68 Labour Research No. 4, at 1 (1979). In the 19th century, private land ownership in Britain was also concentrated in a relatively small aristocratic class, but it is now much more fragmented. *Id.* Around 32% of the country, however, is still owned by the titled families, including some with holdings over 100,000 acres. *Id.* Conversely, only 10% of the land in England and Wales is devoted to national parks, of which none can be classified as wilderness. UK Association of National Park Authorities, National Parks Facts and Figures, avail. at

[www.nationalparks.gov.uk/index/learningabout/factsandfigures.htm](http://www.nationalparks.gov.uk/index/learningabout/factsandfigures.htm) Thus, the British concept of "natural beauty" does not refer, typically, to areas untouched by human hands.

<sup>130</sup> Ruben N. Lubowski, et al, *Major Uses of Land in the United States: 2002*, at 35 (EIB-14. U.S. Dept. Agric., Econ. Research Serv. 2006), access. at: <http://www.ers.usda.gov/publications/EIB14/eib14j.pdf>.

<sup>131</sup> <http://www.peakdistrict.org/>.

<sup>132</sup> <http://www.nps.gov/yell/>.

<sup>133</sup> R.N. Hutchins, NATIONAL PARKS AND ACCESS TO THE COUNTRYSIDE ACT 1949, at 3-4 (1950)

<sup>134</sup> The Wilderness Act of 1964 defines wilderness as "an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain." Wilderness Act § 2(c), 16 U.S.C. § 1131.

Thus, the British definition of “natural beauty” does not refer, typically, to areas untouched by human hands. Instead, the countryside revered in Britain is the product of human interaction with nature for centuries. Whatever may have been its condition before man arrived, “nature” in Britain now often connotes meadows of grazing sheep or fields of flax, hedgerows, stone walls and old barns. Indeed, government authorities recognize that much of the countryside’s attraction is the result of these rural development features, so their efforts are aimed as much at preserving stone walls and hedgerows as they are at nature itself.<sup>135</sup>

British law contains a variety of tools that protect the beauty of the countryside. These regulations strictly control development in the countryside for no other reason than to promote aesthetic or cultural values. Because British law regarding land development is much more restrictive than American law, it provides an interesting comparison of how societies balance private and public interests in property.

In many respects, the process governing land development in England has much in common with the U.S. system.<sup>136</sup> Both control mechanisms are concerned primarily with the separation of incompatible uses,<sup>137</sup> and secondarily with creating efficient and aesthetically pleasing urban plans.<sup>138</sup> Both proceed from a central land use plan. In the U.S., most cities and many counties have a comprehensive land use plan, which is then

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<sup>135</sup> “Rural England”, *supra* n. \_\_, at 101.

<sup>136</sup> I will not attempt in this section to make the reader an expert in British planning law, but rather to provide enough information to illustrate significant similarities and differences in the two systems. For comprehensive treatment, see Encyclopedia of Planning Law and Practice (Malcolm Grant and Sir Desmond Heap, eds. 1996)[hereinafter Encyclopedia].

<sup>137</sup> Sir Desmond Heap explains that English town planning law evolved to deal with "the problem of the dwelling-house built in the shadow of the factory and of the factory erected in the midst of the garden suburb." See Encyclopedia at Section 1-001, p. 10001.

<sup>138</sup> Royal Town Planning Institute, “What is Planning?,” avail. at <http://www.rtpi.org.uk/planning-advice>.

implemented through zoning, subdivision, and other regulations. In England, the planning process results in a district local plan that combines many of these aspects.

The differences in the two systems, however, have important consequences. First, while the American system allows local governments to exercise primary planning authority, the British system's control mechanism gives more authority over development to regional and national bodies. The Secretary of State of the Environment retains centralized control over all policy relating to planning.<sup>139</sup> The degree of central control is quite remarkable from the American perspective, where there is usually little federal or even state level interference with local land use decisions, except where particular environmental laws such as the Endangered Species Act or wetlands restrictions are implicated.<sup>140</sup> In England, however, the Department of the Environment (DOE) issues detailed policies concerning land use planning, which require specific planning decisions in specific circumstances. For example, national policy requires planners at the district level to strictly control development in the countryside.<sup>141</sup> Moreover, the central government can become directly involved in individual land use decisions: the DOE may "call in" any application for planning permission for decision in the first instance at the national level<sup>142</sup> and landowners may appeal to the DOE the local authority's refusal to grant planning permission.<sup>143</sup> British courts have upheld this strong central government role.<sup>144</sup>

As a result, there is less chance that a "race to the bottom" will develop, in which competitive forces overwhelm local attempts to control development. While local

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<sup>139</sup> Ency. at 1-050, p. 10015.

<sup>140</sup> *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994)(land use regulation "function traditionally performed by local governments"). Several states, such as Oregon, have moved toward greater control at the state level. *See generally* Jerry L. Anderson & Daniel Luebbering, "Zoning Bias II: A Study of Oregon's Zoning Commission Composition Restrictions," 38 URB. LAW. 63, 65-68 (2005).

<sup>141</sup> *See* Cotswold District Local Plan 1995, Section 3.55, p.20.

<sup>142</sup> Section 77, Town and Country Planning Act 1990 (hereinafter TCPA 1990); *see* Alder, at p. 3

<sup>143</sup> Section 78, TCPA 1990.

<sup>144</sup> *See, e.g., R. v. Sec'y of State ex p. Southwark L. B. C.* [1987] J.P.L. 587.

officials may feel pressure to waive a restriction to promote the economic development of an area, regional and national officials would be more focused on broader interests, including preserving aesthetics. In addition, using regional rather than local control over the planning process allows the government authority to take into account the relationship among various towns and the rural areas in between.<sup>145</sup> The planners focus on retaining the integrity of individual communities and specifically guard against one community to become a suburb of another. For example, the plan for old market town of Chipping Campden in the Cotswolds quite specifically prohibits further development along the road which leads to the small hamlet of Broad Campden, only 200 meters away, "[t]o prevent the character of [Broad Campden] being swamped by its much larger neighbour."<sup>146</sup>

Second, most American towns exercise very little control over the specific nature and design of development, as long as it is within the broad parameters of the applicable zoning classification and meets the subdivision requirements. In contrast, the English planning process becomes heavily involved in the specifics of the proposed use. For example, in Chipping Campden, the Cotswold District Council refused planning permission for a housing development because the nature and number of planned dwellings would be "detrimental to the character and appearance" of the area and would have an adverse effect on "views into and from the surrounding countryside and town."<sup>147</sup> The Council determined that the proposal's impact on the landscape would be contrary to policies contained in the county Structure Plan and the Cotswold District Local Plan specifically protecting landscape in Areas of Outstanding Natural Beauty.<sup>148</sup> The plan

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<sup>145</sup> See Ashley S. Miller, *Developing Regionalism: A Review of The Regional City: Planning for the End of Sprawl* by Peter Calthorpe and William Fulton, 11 N.Y.U. ENVTL. L.J. 842 (2003); Patricia E. Salkin, *Symposium 2005: Supersizing Small Town America: Using Regionalism to Right-Size Big Box Retail*, 6 VT. J. ENVTL L. 9 (2004-5).

<sup>146</sup> District Local Plan 1993, Section 6.7.

<sup>147</sup> Decision Notice, CD.1466/D, p. 1 (on file with author).

<sup>148</sup> Decision Notice, at p.2.

was also rejected because of its "suburban-style layout and house designs, with large houses in comparatively small gardens."<sup>149</sup> The Council noted that the uniform design of the houses would be out of character for the area, which contained "individually-designed properties set in large gardens."<sup>150</sup> While this development faced greater controls because it was in an Area of Outstanding Natural Beauty,<sup>151</sup> in many instances British planning delve far deeper than American authorities do into the design of the development.

Finally, when planning permission is refused, compensation is rarely awarded in England. Although the contrast can be overdrawn, it can be said that the British landowner has no legitimate expectation of development absent planning permission, while in the U.S. there is a legitimate expectation of development absent a pre-existing regulation prohibiting it. As described below, significant controls on development have long been a part of British landowners' expectations.

Although town planning first became part of British law in 1909, Parliament attacked the problem comprehensively in 1947, pushed by the need to rebuild the areas destroyed in World War II in an orderly fashion.<sup>152</sup> The 1947 Act established complete government control over the development of land, by absolutely prohibiting any kind of development without planning permission.<sup>153</sup> The most remarkable aspect of the 1947 Act, however, was its nationalization of development rights. Sir Desmond Heap called the Act "the most drastic and far-reaching provision[] ever enacted affecting the ownership of land . . . and the liberty of an owner to develop and use his own land as he

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<sup>149</sup> Decision Notice, *supra* n. \_\_, at p.2.

<sup>150</sup> *Id.*

<sup>151</sup> Chipping Campden lies in the Cotswolds, which the planners describe in poetic terms: "Nowhere in England is there such a lack of stridency. The colours, the grey of the stone walls and of the cottages and manor houses, the green and gold of the pasture and arable fields, seem softly blended. The landscape is a watercolour." Cotswold District Local Plan, Section 2.5, p.5 (1999).

<sup>152</sup> *Encyclopedia*, *supra* n. \_\_ at 1-001.

<sup>153</sup> *Id.*, at 1-002. Under the American system, a developer must obtain approval of a plat if subdivision of land is proposed; otherwise, only a building permit must be obtained, which is a ministerial act if the proposed development falls within the zoning classification.

thinks fit."<sup>154</sup> Landowners would henceforth have no right to change the existing use of land and, in return for this expropriation of development value, could make a claim on a £300 million fund.<sup>155</sup> Thereafter, because the government would now own the development rights, landowners would be required to pay development charges for the benefits conferred when the government granted development permission.<sup>156</sup>

The plan to nationalize land development rights, however, did not succeed. The 1954 Town and Country Planning Act eliminated the development levy and allowed development fund claims only when the landowner had been subjected to planning restrictions that limited or prevented the development of land.<sup>157</sup> Even though development value had not been expropriated, however, the general rule that no compensation would be granted for refusing planning permission for new development remained.<sup>158</sup> Compensation would be granted only where permission was withdrawn after it had already been granted or where retroactive controls on existing development destroyed its value – a vested rights approach.<sup>159</sup> The 1949 Act also included a concept of “planning gain,” requiring developers who realize an increase in property value when consent to develop is granted to share some of that benefit with the community.<sup>160</sup> Although the concept of planning gain was eventually abandoned as unworkable, vestiges of the notion that developers owe something to the community may be found in the idea of greater access rights.

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<sup>154</sup> *Id.*, 1-002, at p. 10002.

<sup>155</sup> 1947 Town and Country Planning Act (TPCA), Part VI; Encyclopedia, *supra* n. \_\_\_, 1-003, p. 10002.

<sup>156</sup> 1947 TPCA, Part VII; *see also* Michael Purdue, CASES AND MATERIALS ON PLANNING LAW 416 (1977)(describing the “betterment levy” imposed by the 1947 Act).

<sup>157</sup> Town and Country Planning Act of 1954; Encyclopedia, *supra* n. \_\_\_, 1-005, 1-006, pp. 10003-4.

<sup>158</sup> Purdue, at p. 418.

<sup>159</sup> Moreover, the Planning and Compensation Act 1991 repealed all existing statutory provisions providing for the payment of compensation for adverse planning decisions. Victor Moore, A PRACTICAL APPROACH TO PLANNING LAW 6 (3d ed. 1992).

<sup>160</sup> *See* Shoard, *supra* n. \_\_\_, at 33. *Compare Nollan v. Calif. Coastal Council*, 483 U.S. 825 (1987)(development permission may not be conditioned on greater public access rights without compensation).

In 1990, Parliament enacted a new Town and Country Planning Act, along with several other planning acts relating to listed buildings, conservation areas and hazardous substances.<sup>161</sup> These British laws, which are now the main planning controls, place significant restrictions on development that would damage the scenic landscape, illustrating the value the public places on aesthetics.<sup>162</sup> In general, local authorities have broad authority to deny “planning permission,” roughly equivalent to a plat approval in the American scheme, if the proposed development would harm local interests, including preserving the area’s scenery.<sup>163</sup> Furthermore, at the national level, restrictions include stringent measures to protect historic buildings, wildlife, and the countryside.<sup>164</sup>

The development boundary is another feature of British planning law that significantly protects countryside values.<sup>165</sup> Within the development boundary, development "is acceptable in principle."<sup>166</sup> This hardly means that development is a foregone conclusion. The development must be "of an appropriate scale, in sympathy with the form and character of the settlement and the surroundings of the site," and it must not have a "significant adverse impact on the environment."<sup>167</sup> This of course means that the development must be carefully tailored to the site, and the district council will look closely at the design and size of the development to ensure that it does not unduly impact its neighbors or the town in general.<sup>168</sup>

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<sup>161</sup> Ency., *supra* n. \_\_, at 1-029, p. 10011.

<sup>162</sup> See generally Andrew Waite & Tim Smith, “Constraints on Development in the United Kingdom,” NAT. RES. & ENV. 353 (Summer 1998).

<sup>163</sup> *Id.*, at 353.

<sup>164</sup> *Id.*, at 355-56.

<sup>165</sup> District Local Plan 1993, Section 4, p.16. See Chipping Campden map, Exhibit 1.

<sup>166</sup> District Local Plan 1995, p. 20.

<sup>167</sup> Policy 1, District Local Plan 1995, p. 20.

<sup>168</sup> See Policy 1, Note for Guidance, p. 20.

Outside the development boundary, only strictly limited forms of development are allowed.<sup>169</sup> For example, a farmer would not be allowed to build a new house on his or her land unless there is a proven need for the dwelling.<sup>170</sup> Many developers have tried to get around the development restrictions by converting existing agricultural structures, such as barns, into houses or apartments. The policy also strictly controls this practice, allowing such conversions if they positively contribute to the local rural economy or relieve other development pressures, for example.<sup>171</sup>

Zoning maps may also contain "Policy Areas" that are subject to very specific controls, many of which are calculated to preserve aesthetic values. In the scenic Cotswolds, for example, the map for the ancient market town of Chipping Campden contains Policy Area D, called "The Craves", which prohibits any development that would "adversely affect the open character, general appearance, or setting afforded to the surrounding areas or buildings."<sup>172</sup> In Policy Area L, an area in the center of town, new development is "very unlikely to be permitted."<sup>173</sup> Thus, local plans may incorporate significant restrictions on development likely to impair the community's interest in maintaining local character.

Many other types of development controls may be used to preserve the British countryside for the enjoyment of the public. For example, the Countryside Agency may

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<sup>169</sup> See Section 3.135, p.38 (there is often the feeling that the unscrupulous might attempt to circumvent strict controls on development in the countryside, by putting forward a weak or a well-argued but spurious case for a dwelling. . . . [I]t is necessary to strictly apply rigorous criteria.")

<sup>170</sup> See Policy 2, p. 21, and Policy 11 (Agricultural or Forestry Workers' Dwellings), p. 39, 1995 Plan.

<sup>171</sup> See Policy 7, and Section 3.107-113, pp. 31-33, Plan 1995.

<sup>172</sup> District Local Plan 1993, Policy 1.5, p. 20.

<sup>173</sup> Local Plan 1993, Policy 1.5, p. 20.

designate an “Area of Outstanding Beauty” or a “conservation area,” in which development can occur only in ways that “preserve or enhance the natural beauty of the landscape.”<sup>174</sup> Similarly, English Nature has the power to designate an area as a Site of Special Scientific Interest (SSSI), by reason of any of its flora, fauna, geological or physiographical features.<sup>175</sup> Landowners in the SSSI must obtain government consent for activities that may damage these values and, at least until CRoW, English Nature typically entered into management agreements that provided compensation in exchange for preservation.<sup>176</sup> CRoW now allows the agency to prohibit damaging activities without compensation, as discussed below.<sup>177</sup> The control of development goes literally down to the bushes: the Department of the Environment now requires the notification of local planning authority before hedgerows over 20 meters long are removed. If the hedgerow is considered important under certain criteria, the local authority can refuse permission.<sup>178</sup>

In combination, these development restrictions effectively preserve the scene of “natural beauty” coveted by British ramblers. Similar controls in the United States, of course, would quickly run into constitutional takings claims, if the restriction significantly impacted property values.<sup>179</sup> While British laws provide compensation in

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<sup>174</sup> CRoW, §82. 36 AONBs, covering about 15% of England, have been designated by the Countryside agency. Countryside Agency website, avail. at <http://www.countryside.gov.uk/LAR/Landscape/DL/aonbs/index.asp>. The responsibility for designation will shift to a new body, Natural England, in October 2006. Natural Environment and Rural Communities Act 2006.

<sup>175</sup> Wildlife and Countryside Act 1981, Part II (amended 1985 and by CRoW 2000).

<sup>176</sup> Wildlife and Countryside Act 1981. Andrea Ross & Jeremy Rowan-Robinson, “Behind Closed Doors: The Use of Agreements in the UK to protect the environment,” 1 ENV. L. REV. 82, 86 (1999). For example, in the Pennine Dales, a management agreement requires farmers to maintain land in grass, to limit use of fertilizer and cultivation, and to repair barns and walls using only traditional materials, in exchange for payments. José Manuel L. Santos, THE ECONOMIC VALUE OF LANDSCAPE CHANGE, at 123 (1998).

<sup>177</sup> See *infra* Section III.A.

<sup>178</sup> Pauline M. Callow, “Country Report: United Kingdom,” 5 EUROP. ENV. L. REV. 338 (Dec. 1996)(citing Depart. of the Env. News Release 430 (Oct. 21, 1996)).

<sup>179</sup> See, e.g., *Lucas v. South Carolina Coast. Council*, 505 U.S. 1003 (1992).

limited circumstances, for the most part Britain seems to reverse the presumption in favor of development present in American property law.

## **2. Increasing Recognition of Access Rights**

Sooner than part from the mountains, I think I would rather be dead....  
I may be a wage slave on Monday, but I am a free man on Sunday.<sup>180</sup>  
- Ewan Maccoll, *The Manchester Rambler*

While land use laws increasingly focused on preserving the natural beauty of the countryside, Parliament also slowly moved toward granting the public greater access. Even as enclosure was foreclosing the public's use of the commons, many recognized that the growth of cities in the Industrial Revolution actually increased the need for access to the countryside, "as a recreation-ground for all classes."<sup>181</sup> In essence, the battle over the loss of a common right to ramble never ended. Even as far back as 1868, commentators noted a movement to change legislatively the results of court decisions that limited public access rights, by declaring a public right of exercise and recreation on waste lands "without paying the value of the private rights of ownership."<sup>182</sup> The establishment of a Commons Preservation society in the 1870's also indicates how long the public has been seeking greater protection for public uses of land.<sup>183</sup> In 1884, MP James Bryce introduced the first bill to establish a public right to roam.<sup>184</sup> Although the bill failed, the movement toward greater access had begun. During the next century, Parliament tipped the balance toward greater public use slowly; finally, with the enactment of CROW in

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<sup>180</sup> Excerpt from classic 1930's ballad, "The Manchester Rambler," by Ewan Maccoll, accessible at [news.bbc.co.uk/1/hi/uk/1953935.stm](http://news.bbc.co.uk/1/hi/uk/1953935.stm).

<sup>181</sup> Hunter, *supra* n. \_\_\_\_, at vii.

<sup>182</sup> Elton, *TREATISE ON COMMONS AND WASTE LAWS*, *supra* n. \_\_\_\_, at 301.

<sup>183</sup> Hunter, *supra* n. \_\_\_\_, at vii.

<sup>184</sup> UK Association of National Park Authorities, *History of the National Parks*, avail. at <http://www.nationalparks.gov.uk/index/learningabout/history.htm>.

2000, the right to roam was restored. The impetus for this change thus has deep roots in British history.

In 1932, a large group of ramblers from Manchester trespassed on private land on Kinder Scout, a high windswept plateau containing the highest point in the celebrated Peak District. The trespassers engaged in this civil disobedience to protest their exclusion from “some of the best countryside England has to offer.”<sup>185</sup> Confronted by a group of the landowner’s gamekeepers, violence ensued and some of the trespassers were arrested. Public sentiment, however, favored the hikers, and after WWII, the government under Prime Minister Attlee began a movement toward public rights to the countryside. One of the first steps was the establishment of national parks, one of which included the Kinder Scout area.<sup>186</sup> Remarkably, just as Americans now revere the protests of Martin Luther King and Rosa Parks, which brought down the barriers of discrimination, Britons now praise the Kinder Scout trespassers as having secured “far-reaching changes in unjust and oppressive law.”<sup>187</sup>

In 1939, Parliament attempted to open the mountains to public use through the Access to Mountains Act. Instead of declaring mountains to be open for roaming, however, the Act merely set up an “elaborate machinery” for issuance of an access order for a particular area.<sup>188</sup> The process required an application to be filed with the Minister of Agriculture, but the applicant had to pay large deposits to cover the costs of the

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<sup>185</sup> Giles Wilson, “The Walk That Changed Britain,” BBC News Online, (April 26, 2002), accessible at <http://news.bbc.co.uk/1/hi/uk/1953035.stm>.

<sup>186</sup> *Id.*

<sup>187</sup> Michael Meacher, MP, then Minister of the Environment, in 2002 speech celebrating the 70th anniversary of the Kinder Scout protest. <http://www.huntfacts.com/kinderScout.htm>

<sup>188</sup> Shoard, *supra* n. \_\_\_, at 182.

process and many applications were rejected. Moreover, any access granted was subject to numerous restrictions.<sup>189</sup>

In 1949, Parliament created “immense changes” in the right of public access by enacting the National Parks and Access to the Countryside Act (NPACA).<sup>190</sup> Under this legislation, the system of public rights of way, including footpaths, bridleways, and carriageways, was comprehensively mapped. Each county council conducted a survey showing where public rights of way were thought to exist.<sup>191</sup> A landowner or the public could appeal this determination, but would have to produce evidence contradicting the council’s proposed designation.<sup>192</sup> This process resulted in a definitive map, which was deemed conclusive regarding these easements.<sup>193</sup> The map is reviewed periodically to conform to changes or new information.<sup>194</sup> A new right of way may be created, but only by compensating the owner.<sup>195</sup> The Act also provided the national government with authority to establish long-distance routes.<sup>196</sup>

The NPACA was important, because it systematically confirmed public rights of way and established a procedure for administratively determining rights over controversial paths. If a landowner challenged the existence of a path, both sides could produce evidence of use or nonuse and the matter could be settled rather quickly and inexpensively. Thus, the Act created much greater certainty regarding the existence and location of footpaths, which furthered the public's confidence in using them.

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<sup>189</sup> *Id.*, at 182-83.

<sup>190</sup> Hutchins, *supra* n. \_\_\_\_, at iii.

<sup>191</sup> *Id.* at 13-14.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 15.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 17 (citing NPACA, Sections 46 and 107).

<sup>196</sup> *Id.* at 20 (citing Sections 51-55).

The NPACA also allowed the government to issue compulsory orders to open up private land to public roaming.<sup>197</sup> However, this attempt to provide roaming rights failed miserably. In order to issue a compulsory order, the permission of three cabinet ministers was required, a cumbersome process had to be followed, and compensation paid.<sup>198</sup> Moreover, the request for an access order had to come from a county council, many of which were dominated by landowners or locals reluctant to open the land to outsiders.<sup>199</sup> Only two access orders were ever issued under NPACA.<sup>200</sup> Thus, the public's desire for greater countryside access remained unsatisfied.

### III. Countryside and Rights of Way Act (CRoW) 2000

Although the extensive network of footpaths, coupled with the establishment of public lands under NPACA, gave Britons significant opportunities for walking in the countryside, the public still wanted more. Footpaths were confined to limited routes and some desirable lands had no public access at all. "Why," asked Marion Shoard, "shouldn't people be able to go where they wanted to go?"<sup>201</sup>

Britons also looked jealously at the far greater access rights provided by their European neighbors.<sup>202</sup> For example, in Sweden, Finland and Norway, the public enjoys "allemansträtten," which allows a general right of access to all land in the countryside,

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<sup>197</sup> NPACA, §§ 59, 70.

<sup>198</sup> Shoard, *supra* n. \_\_, at 30-31. The Access to Mountains Act of 1939 also failed to provide access for similar reasons. *Id.* at 182. Interestingly, one commentator indicate that Parliament declined to include a general right to roam in NPACA not because they were convinced that landowners would be unduly burdened, but because they believed owners typically allowed access anyway. Hutchins, *supra* n. \_\_, at 22. See also, Hunter, *supra* n. \_\_, at vii ("public owe much to the generosity and good sense landowners, but the use of the country for recreation should not be left to depend entirely upon the good will of a limited class.")

<sup>199</sup> Shoard, *supra* n. \_\_, at 189-90.

<sup>200</sup> *Id.*

<sup>201</sup> Shoard, *supra* n. \_\_, at 5.

<sup>202</sup> Shoard, *supra* n. \_\_, at 261.

although the right stems from custom rather than explicit law. Pursuant to allemansrätten, the public may walk over any private land, unless if it would conflict with privacy (near houses or other dwellings) or would interfere with growing crops.<sup>203</sup> Far more than just walking, allemansrätten gives the public the right to picnic or camp, and even gather mushrooms or berries.<sup>204</sup> Other countries, such as Germany, Denmark, Switzerland, Austria and Spain, also give the public broad access rights to certain types of private lands,<sup>205</sup> and Britons wondered why they could not enjoy them as well.

Public sentiment for roaming rights began to grow in the 1990's. Ramblers' rights groups conducted mass occupations of countryside areas.<sup>206</sup> In 1994, the Labour Party, then out of power, made the public right of access part of its platform at its annual conference. So, when Labour ended 18 years of Conservative Party rule in 1997, the people expected action to be taken.<sup>207</sup> The Blair government began in February 1998 by issuing a consultation paper, to solicit comments on how best to provide access to the countryside, especially mountain, moor, heath, down and registered common land, which it estimated was some 1.2 to 1.8 million hectares or around 10% of the land area of England and Wales.<sup>208</sup>

Landowners, of course, were understandably wary of the new proposals. They feared not only a loss of property value due to the imposition of an easement, but also

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<sup>203</sup> For a general description of the allemansrätten in Sweden, for example, see <http://www.naturvardsverket.se/allemansratten/>

<sup>204</sup> *Id.*

<sup>205</sup> Shoard, *supra* n. \_\_, at 6.

<sup>206</sup> *Id.*, at 4 (describing "The Land is Ours" movement).

<sup>207</sup> *Id.*, at 6-7. See 1997 Labour Party Manifesto, accessible at <http://www.labour-party.org.uk/manifestos/1997/1997-labour-manifesto.shtml> (promising public "greater freedom to explore our open countryside").

<sup>208</sup> Department of the Environment, *Access to the Open Countryside in England and Wales* (February 1998); see also Department of the Environment, *Appraisal of Options on Access to the Open Countryside of England and Wales* (March 1999), available at <http://www.defra.gov.uk/WILDLIFE-COUNTRYSIDE/access/index.htm>.

increased costs of liability insurance, greater need for supervision of livestock and increased costs of repair of fences and other damage, and even costs for the provision of access in the first place by installing stiles or kissing gates. At a minimum, landowner rights groups believed the government should compensate them for access or allow them to charge users in order to recoup these costs, which they estimated would be anywhere from £29 and £37 per hectare annually.<sup>209</sup> Local authorities and recreational users overwhelmingly opposed compensation, however, except perhaps for improvements necessary to facilitate the initial provision of access.<sup>210</sup> Although a few suggested that roamers should be required to buy an annual pass for access nationally, the vast majority opposed any fee for access.<sup>211</sup>

In the end, Parliament was convinced that the public benefit from opening up access to these lands would far outweigh the additional burden on the landowners.<sup>212</sup> The government estimated that costs to landowners would be minimal, especially on land that was not used for hunting.<sup>213</sup> Damage caused by access users, such as vandalism, erosion, littering, and stock worrying, was anticipated to be rare.<sup>214</sup> For sites that would be infrequently visited and were not used by landowners for hunting, annual costs to landowners were thought to be extremely low, estimated to range from £.06 to £.51 per hectare. At the upper end, however, for popular sites also used for hunting, landowners

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<sup>209</sup> Department of the Environment, *Analysis of Responses to the Access to the Open Countryside Consultation Paper*, Ch. 6 (March 1999) (the total annual costs to landowners were estimated to be between £21 million and £88 million), available at <http://www.defra.gov.uk/WILDLIFE-COUNTRYSIDE/access/index.htm>.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Shoard, at 259 (ability to exploit property for economic gain can co-exist with right of access).

<sup>213</sup> *Appraisal of Options*, Ch. 7.

<sup>214</sup> *Id.* at Table 7.1.

might lose as much as £8.70 per hectare when loss of hunting income was considered.<sup>215</sup>

The government estimate of benefits to the public, based on a “willingness to pay” analysis, ranged from £.39/hectare for infrequently used upland sites to £87.50 for frequently used lowland areas.

In introducing its Right to Roam proposal, the Blair administration set out its case for this readjustment in rights: “In a crowded island, we are fortunate to have some of the most beautiful landscapes to be found anywhere in the world. But through England and Wales, from mountain and moorland to heath, down and ancient common lands, some of our finest countryside has been closed to public access for centuries.”<sup>216</sup> Although the government considered a largely voluntary access plan with compensation incentives and a plan that included condemnation of access with landowner payments, both options entailed much higher implementation costs in the form of implementation and administration costs.<sup>217</sup> Moreover, experience with the voluntary approach under previous acts increased skepticism in the efficacy of that approach.<sup>218</sup> Therefore, the administration settled on a new statutory right of access to the open countryside, coupled with restrictions on the right to protect landowner interests.<sup>219</sup> While compensation would not be provided, local authorities could assist with the costs of providing access, and landowner liability would be limited.<sup>220</sup> Thus, the government believed it had struck the proper balance between interests of the public and the landowners.<sup>221</sup>

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<sup>215</sup> *Id.* at Table 7.2.

<sup>216</sup> Department of the Environment, *Access to the Open Countryside of England and Wales: The Government’s Framework for Action*, Foreward (March 1999), available at <http://www.defra.gov.uk/WILDLIFE-COUNTRYSIDE/access/>.

<sup>217</sup> Appraisal of Options, Executive Summary.

<sup>218</sup> Framework, Foreward.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*, at para. B.16 and B.17.

<sup>221</sup> *Id.*, Forward.

## A. Mechanics of Legislation

In 2000, the British Parliament enacted CRoW, which opened up certain categories of private property to public access. Under this Act, the public has the right to wander over registered "common land" and lands classified as "open country," consisting of mountain, moorland, heath and downland.<sup>222</sup> Lands qualifying for access comprise about 12% of England and Wales, an estimated 4 million acres in England alone.<sup>223</sup> Some of the country's most scenic real estate were opened up, including areas fought over by nature lovers and landowners for over a century.<sup>224</sup> Vast landholdings that were previously shut off from the public, including the downs of "Wuthering Heights" fame in West Yorkshire and the moors of Dartmoor, which is currently occupied by the Prince of Wales, are now accessible.<sup>225</sup>

The public may freely enter lands classified as common land or open country "for the purposes of open-air recreation," provided that they do not damage fences or gates.<sup>226</sup> Unlike the footpath easement, wanderers are not restricted to any particular right-of-way on these lands. The access is primarily for walking and picnicking; one may not hunt, light a fire, swim in nontidal waters, remove plants or trees, ride a bicycle or horse, or

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<sup>222</sup> Countryside and Rights of Way Act 2000 (hereinafter CROW), Section 1.

<sup>223</sup> Giles Wilson, "The Walk that Changed Britain," BBC News Online (April 26, 2002), accessible at [news.bbc.co.uk/1/hi/uk/1953035.stm](http://news.bbc.co.uk/1/hi/uk/1953035.stm). CRoW applies only to England and Wales. In Scotland, private land is presumed to be free to walk on unless the owner has specifically excluded it. *Id.* (cite Scottish statute and reasons for being able to exclude).

Margot Higgins, "Conservationists Celebrate UK Countryside Bill," (March 13, 2000) avail. at [www.enn.com/news/enn-stories/2000/03/03132000/ukcons\\_10945.asp](http://www.enn.com/news/enn-stories/2000/03/03132000/ukcons_10945.asp).

<sup>224</sup> Mark Rowe, "The Right to Roam, but not for years," *The Independent on Sunday* (Jan. 14, 2001), access at [www.millennium-debate.org/indsun14jan2.htm](http://www.millennium-debate.org/indsun14jan2.htm).

<sup>225</sup> *Id.*

<sup>226</sup> CRoW, Section 2.

disrupt lawful activities on the land.<sup>227</sup> Breaches of these restrictions will result in loss of the right of access for a period of 72 hours.<sup>228</sup>

CRoW requires the Countryside Agency to prepare a definitive map of all registered common land and open country.<sup>229</sup> The agency issued maps in draft form, received comments, and then issued the maps in provisional form in 2004.<sup>230</sup> The landowner could then appeal the designation to the Secretary of State, who could appoint an inspector to investigate and decide the appeal.<sup>231</sup> The inspector could hold a hearing or “local inquiry” with regard to the case.<sup>232</sup> The only ground for appeal with respect to open country designation was that the land did not in fact consist “wholly or predominately of mountain, moor, heath or down.”<sup>233</sup> Notably absent was any power to balance the rights of the public against the interests of the landowner. Once all of the appeals were determined, the agency issued the maps in conclusive form.<sup>234</sup>

Similar to laws regarding footpaths, CRoW prohibits anyone from posting a sign “likely to deter the public from exercising” its access rights.<sup>235</sup> Thus, any “Keep Out” or “Trespassers Will Be Prosecuted” signs could result in substantial fines.<sup>236</sup> On the other side, the access authority (typically the local highway agency) may adopt by-laws

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<sup>227</sup> CRoW, Schedule 2.

<sup>228</sup> CRoW, Section 2(4).

<sup>229</sup> CRoW, Section 4. The Countryside Agency prepares the map for England, while the Countryside Council for Wales prepares the map for Welsh open country. Land that was registered common land and land over 600 meters above sea level immediately qualified as open country without going through the mapping process. CRoW, Section 1.

<sup>230</sup> CRoW, Section 5.

<sup>231</sup> CRoW, Section 6 (in Wales, the appeal goes to the National Assembly); Section 8.

<sup>232</sup> CRoW, Section 7.

<sup>233</sup> CRoW, Section 6.

<sup>234</sup> For the detailed maps, see the Countryside Agency’s website: [www.countryside.gov.uk](http://www.countryside.gov.uk).

<sup>235</sup> CRoW, Section 14.

<sup>236</sup> For first offenses, the fine could be up to £200 under the current scale. Refusal to comply with an order to remove the offending notice could bring much larger penalties (currently up to £1000).

regulating access rights, and the Countryside Agency has already issued a Code of Conduct to guide the public and landowners.<sup>237</sup>

Not all land is eligible for access designation. The CRoW exempts land that is plowed or used as a park or garden.<sup>238</sup> Quarries, golf courses, and racecourses are also exempt. No land within 20 meters (about 22 yards) of livestock buildings may be included. CRoW also exempts any land covered by buildings, including the “curtilage” of that land, which would normally include the yard or fenced area around a dwelling house.<sup>239</sup>

Notably, the declaration of public access rights does not carry with it any right to compensation. One justification, put forward when the government initially proposed the scheme, was that, because access would be limited to land not currently used for development or agriculture, the additional rights would not significantly harm private landowners.<sup>240</sup> The government has agreed to provide compensation for vehicular access over common lands.<sup>241</sup>

Landowners were justifiably concerned about the possibility of liability to injured roamers. What if a child decides to jump in a farm pond and drowns? What if a hiker is injured by livestock or slips and falls down a rocky slope? CRoW attempts to address these concerns by limiting the standard of care due owed to those exercising access rights to the same level owed to trespassers, rather than the higher level owed to invitees or

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<sup>237</sup> See [www.countryside.gov.uk](http://www.countryside.gov.uk) and CRoW, Sections 17 & 20.

<sup>238</sup> See CRoW, Schedule 1 (Excepted Land).

<sup>239</sup> *Id.* See also Explanatory Notes to the Countryside and Rights of Way Act 2000 (hereinafter “Explanatory Notes”), para. 13.

<sup>240</sup> Dept. of the Env., Transport and the Regions, “Access to the Open Countryside in England & Wales,” (Feb. 1998), at 23.

<sup>241</sup> See CRoW, Section 68.

licensees.<sup>242</sup> Moreover, the act specifically provides that land occupiers will incur no liability for risks arising from natural features of the landscape, water (river, stream, ditch, or pond), or passage across walls, fences, or gates (except for proper use of a gate or stile).<sup>243</sup> The landowner or occupier remains liable, however, for recklessly or intentionally creating risks.<sup>244</sup>

CRoW is a remarkable transformation of the right to exclude others into a public right to roam. For those landowners affected, the re-allocation of this stick in their bundle of rights means that they will have diminished privacy and potential damage to their land from a potential invasion of hikers or picnickers. Before Parliament passed the Act, landowners complained that the burdens on them would be substantial. As we now have some knowledge of early developments under this new regime, we can begin to assess how the shift in access rights has worked so far.

## **B. Recent Developments**

Several recent cases illuminate the adjustments required by landowners under CRoW. In 2001, pop singer Madonna and her husband, film producer Guy Ritchie, purchased Ashcombe House in south Wiltshire for £9 million (about \$16.5 million). The 1,132-acre property includes a public footpath, which comes within about 100 yards from the mansion where the family resides. Although this caused the singer some concern, she at least knew about the footpath when she purchased the land and she has reportedly been

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<sup>242</sup> CRoW, Section 13. See *British Railways Board v. Herrington*, 2 WLR 537 (1972) (toward trespassers, landowners have limited duty not to act with “reckless disregard of their safety”). The property owner has duty to warn of known latent deadly hazards, but has no duty to ascertain and warn of all hazards on the property. *Id.* Licensees, in contrast, should be warned of all known hazards, not merely the deadly ones, while invitees may sue due to injuries caused even by hazards unknown to the landowner. *Id.*

<sup>243</sup> CRoW, Section 13; see also Explanatory Notes, para. 29.

<sup>244</sup> CRoW, Section 13.

pleased that so far walkers have not unduly invaded her privacy.<sup>245</sup> However, the couple did protest when the Countryside Agency announced its plans to classify about 350 acres of their estate as “downland,” which qualifies as “open country” under the CROW.<sup>246</sup> That designation would give the public the right to walk across that portion of the property at will. The famous couple objected at a public inquiry into the matter, arguing that the land was not suitable as open country and that free access would violate their privacy rights under the European Convention on Human Rights. An independent inspector appointed to resolve the matter decided that only 130 acres, all of which were out of sight of Madonna’s home, should be classified as downland and opened to access. Because privacy was not therefore at issue, the inspector declined to consider the privacy aspects of the case.<sup>247</sup>

Madonna’s case makes clear that CROW does not allow privacy concerns to outweigh the right to roam. The only considerations are whether the land can be categorized as open country and whether it falls within a designated exemption.<sup>248</sup> Because the act itself has provided, albeit in a limited fashion, for the accommodation of landowner concerns, such as damage to crops or privacy, there is no room, even in the extraordinary cases of celebrities, for additional balancing of those landowner interests.

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<sup>245</sup> Ramblers Association, Statement Regarding the Public Inquiry Concerning Access Land on Ashcombe House Estate, (June 18, 2004) (view at [www.ramblers.org.uk/news/archive/2004/madonna-verdict-statement.html](http://www.ramblers.org.uk/news/archive/2004/madonna-verdict-statement.html)).

<sup>246</sup> Richard Savill, “Madonna Wins Partial Ban on Public Walking Across Estate,” (June 19, 2004), avail. at [news.telegraph.co.uk](http://news.telegraph.co.uk).

<sup>247</sup> *Id.*

<sup>248</sup> There are numerous examples of appeals in which landowners have successfully challenged the characterization of their property as meeting the open country definition. *See, e.g.*, CROW/1/M/03/203 (2003) (land improperly classified as downland because it contained dense scrub and young trees); CROW/1/M/02/82 (qualifying vegetation does not predominate site, as required by methodology). *See generally*, Defra, “Guidance on Appeals under Section 6 of the Countryside and Rights of Way Act 2000”.

However, it remains to be seen whether extreme applications of CRoW could run afoul of higher law, such as the European Convention on Human Rights.<sup>249</sup>

The European Human Rights Convention does mandate the protection of individual property rights. Article 1 of the First Protocol (1P1) of the Convention states:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>250</sup>

The European Court of Human Rights has construed this provision as allowing restrictions on use, without compensation, as long as there is a “fair balance” between the public interest and the burden on the individual.<sup>251</sup>

The Human Rights tribunal had an opportunity to apply the Convention’s property protections to CRoW in a recent case involving the Act’s amendments to the government’s nature preservation powers.<sup>252</sup> Under previous law, English Nature had entered into a voluntary management agreement with the owner of a canal, under which the owner agreed to extensive restrictions on use in exchange for £19,000 per year.<sup>253</sup> Under the 2000 CRoW Act, however, no compensation was required for similar restrictions, even though they clearly impeded the commercial activities of the canal

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<sup>249</sup> Article 8 of the European Convention on Human Rights does contain explicit right of privacy, although the protection may be modified in the pursuit of the rights of others. ECHR, Art. 8. Although Article 8 has been applied primarily in the search and seizure context, it is possible that the European Court of Human Rights could apply it to CRoW.

<sup>250</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, Art. 1.

<sup>251</sup> *James v. United Kingdom*, 8 EHRR 123 (1986)(burden on private owner must not be “disproportionate”); *Papamichalopoulos v Greece*, 16 EHRR 40 (1993)(requiring “fair balance” between community interests and fundamental rights of individual).

<sup>252</sup> *The Queen (on the Application of Trailer & Marina (Leven) Ltd) v Secretary of State for the Environment, Food & Rural Affairs and English Nature*, [2004] EWCA Civ 1580 [hereinafter *Leven*].

<sup>253</sup> These agreements were entered into pursuant to Section 15 of the Countryside Act 1968.

owner.<sup>254</sup> The court found that the impact of these restrictions could have a significant economic impact on the landowner.<sup>255</sup> Nevertheless, the court found that compensation would not have to be provided if the benefit to the community outweighed the impact on the landowner.<sup>256</sup> In this case, the court found that preventing the landowner from harming native flora and fauna was plainly in the public interest and need not be compensated.<sup>257</sup> The court therefore takes the sort of harm/benefit distinction explicitly rejected by the U.S. Supreme Court in *Lucas*.<sup>258</sup>

Most decisions regarding the application of CRoW involve more mundane considerations, such as whether the land qualifies as mountain, moor, heath, or downland. In cases challenging a designation, a government inspector conducts a visual inspection and receives evidence from experts and others. The land must consist “wholly or predominately” of the qualifying habitat, which calls for many discretionary judgments.<sup>259</sup>

For example, landowners succeeded in removing a popular rock feature, Vixen Tor in Dartmoor, from open country designation. The outcropping was considered a landmark, which had been open to hiking for thirty years until the current owners closed it in 2003. Later, the landowner was found guilty of attempting to change the character of the land to improved grassland (which would take it out of CRoW classification) by

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<sup>254</sup> English Nature declared the area a Site of Special Scientific Interest (SSSI) under the 2000 Act, Part III, which “effectively replac[ed] voluntary agreement with mandatory control.” *Leven*, at para. 14.

<sup>255</sup> *Leven*, at para. 16 (impacts could be “severely detrimental”).

<sup>256</sup> *Id.* at para. 58.

<sup>257</sup> *Id.* at para. 71-72.

<sup>258</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022-25 (1992)(criticizing harm/benefit distinction in takings analysis). For an analysis of *Leven*, see Tom Allen, “Human Rights and Regulatory Takings,” 17 J. ENVTL. L. 245 (2005).

<sup>259</sup> CRoW, Section 1.

clearing scrub and applying fertilizer.<sup>260</sup> The Countryside Agency classified the land as open access, due to its character as moor, but the landowners appealed. While the inspector's expert determined that the site "probably" had a predominance of qualifying vegetation, certain assessment was difficult.<sup>261</sup> The inspector concluded that, because there was "some doubt" about the predominance of qualifying cover, the site should not be mapped as open country.<sup>262</sup> In protest of this decision, roamers staged demonstrations at the site, including several mass trespasses.<sup>263</sup> Eventually, the landowners offered to open access under a ten-year agreement, for payments totalling £400,000, which they said represented their costs.<sup>264</sup> In response, the Dartmoor National Park authority offered £1500 per annum. As of June 2006, the two sides had been unable to agree on an access agreement and the site remains closed, despite continued sporadic protests.<sup>265</sup>

The Vixen Tor case illustrates that, without CRoW, landowners may be unwilling to grant access without substantial compensation. The failure to provide compensation for CRoW access thus represents the loss of a valuable property right. Nevertheless, the shift in property rights effected by CRoW seems to be surviving claims that it impermissibly undermines fundamental human rights. As discussed in Section IV below, a similar result under American constitutional law could not be expected.

### C. The Importance of Countryside Access

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<sup>260</sup> Legendary Dartmoor, "The Forbidden Tor," available at [http://www.legendarydartmoor.co.uk/For\\_bidden.htm](http://www.legendarydartmoor.co.uk/For_bidden.htm).

<sup>261</sup> Appeal Decision, CROW/6/M/04/2889 to 2895 (March 2, 2005), at 4, para. 21.

<sup>262</sup> *Id.*, at p. 5, para. 22.

<sup>263</sup> The Forbidden Tor, *supra* n. \_\_\_\_.

<sup>264</sup> Dartmoor National Park Authority, Meeting Minutes (March 3, 2006), app. 1, avail. at <http://www.dartmoor-npa.gov.uk>. The landowners desired reimbursement for potential damage and litter from access users, as well as loss of farm income and income from charging admission to the site.

<sup>265</sup> Dartmoor National Park Authority, Meeting Minutes (June 30, 2006).

"[T]his English country! Why any of you ever live in towns I can't think. Old, old grey stone houses with yellow haystacks and lovely squelchy muddy lanes and great fat trees and blue hills in the distance. The peace of it! If ever I sell my soul, I shall insist on the devil giving me at least forty years in some English country place in exchange."<sup>266</sup>

To Americans, CRoW represents a rather remarkable idea -- that the public's interest in roaming across scenic lands outweighs the private property owner's right to exclude. While we have traditionally emphasized the privacy concerns of the landowner, we have rarely considered the strength of the public side of the balance. This section will discuss in more detail the interests that led to CRoW's validation of the right to roam.

The British commitment to retaining access to the countryside seems to be grounded some important public values, including providing for transportation by foot, enhancing the enjoyment of nature, promoting mental and physical health, facilitating a historical and cultural connection, and building a sense of community.

*1. Means of transportation.* The British tradition of walking in the countryside was originally a matter of necessity. Footpaths or cross-country rambles were the primary means of getting from place to place, especially for commoners with rare access to a horse. Obviously, travel by foot usually is no longer required, when most people have a car or bike, or can take a bus. But footpaths do provide a useful and pleasant alternative to the paved road. Without the footpath, a nice one-mile walk to town, cutting through neighbors meadows, could turn into a three-mile, dangerous trip on narrow, circuitous paved roads without shoulders. Ensuring that it is easy to walk from place to place may significantly reduce reliance on other forms of transportation.

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<sup>266</sup> P.G. Wodehouse, *MOSTLY SALLY* 196 (George Doran Co. 1923).

2. *Enjoyment of Nature.* Roaming rights and footpaths enable the walker to reach places that are not yet spoiled by urban development, from which a road would detract.<sup>267</sup> A hike may lead to a beautiful vista, or a mountain stream, surrounded by natural beauty unblemished by concrete and steel. Walking through the scenery, such as hiking on a footpath through a meadow of grazing sheep, puts you in the middle of the beauty, and makes you a part of it, rather than simply observing it through a car window. The effect is therefore more like a 3-D image than a picture postcard. Moreover, the slow pace allows for a more intimate observation of the wildlife and plants that abound in the countryside.

3. *Mental health.* Walking to town by a footpath allows the walker to “rediscover something of a slower, quieter, more rooted existence,”<sup>268</sup> an advantage that becomes more important as the pace of life increases. Americans tend to view any physical activity as a competitive event, and the walker striding purposefully down a crowded street with hand weights and headphones is perhaps peculiarly American. In contrast, the right to roam celebrates a type of walking that promotes peaceful reflection and a sense of serenity. Marion Shoard, a strong proponent of the right to roam, describes the countryside as a “repository of tranquillity.”<sup>269</sup>

In Wordsworth’s “Tintern Abbey,” the poet basks in the pleasure of once again viewing the rural landscape along the River Wye, exclaiming that the memory of “these beauteous forms” sustained him through many nights in noisy cities, giving him a feeling

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<sup>267</sup> Taplin, *supra* n. \_\_\_, at 4 (footpaths “lead the way to unexpected, hidden landscapes and furnish peaceful places from which to absorb them”).

<sup>268</sup> *Id.*, at 2.

<sup>269</sup> Shoard, *supra* n. \_\_\_, at 1.

of “tranquil restoration.”<sup>270</sup> Wordsworth found nature to be the “anchor of my purest thoughts, the nurse, the guide, the guardian of my heart, and soul of all my moral being.”<sup>271</sup> A walk in the country, therefore, was seen by Wordsworth and his followers to be a powerful antidote to the “dreary intercourse of daily life.”<sup>272</sup>

#### 4. *Physical health.*

Access to the countryside encourages a culture of walking that promotes physical health. Being able to walk out your front door and within minutes be striding through peaceful green meadows is more inviting than the typical American concrete nightmare. Even Americans who live in the country may find it difficult to take a walk, being forced by neighbors’ fences to use country roads with traffic and no shoulders for walkers. Even if the road has a shoulder, the noise, exhaust and danger detracts from its desirability for healthy and pleasant exercise. Footpaths or roaming rights make it possible to walk to town for lunch or for shopping instead of hopping in the car.

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<sup>270</sup> These beauteous forms,  
Through a long absence, have not been to me  
As is a landscape to a blind man's eye:  
But oft, in lonely rooms, and 'mid the din  
Of towns and cities, I have owed to them  
In hours of weariness, sensations sweet,  
Felt in the blood, and felt along the heart;  
And passing even into my purer mind,  
With tranquil restoration:

Tintern Abbey, at lines 23-30.

<sup>271</sup> Tintern Abbey, at lines 109-111.

<sup>272</sup> Tintern Abbey, line 131. See also, *id.*, line 126-28 (nature informs mind, impresses us with “quietness and beauty,” and feeds our “lofty thoughts.”) In a similar vein, Thomas Hardy described the mental release accorded by a walk on “Wessex Heights”:

In the lowlands I have no comrade, not even the lone man’s friend –  
Her who suffereth long and is kind; accepts what his too weak to mend:  
Down there they are dubious and askance: there nobody thinks as I,  
But mind-chains do not clank where one’s next neighbor is the sky.

Thomas Hardy, “Wessex Heights,” in *SELECTED POEMS OF THOMAS HARDY* 43 (John Crowe Ransom ed., 1966).

Health officials in the United States have strongly advocated more walking for Americans, in the face of a growing obesity problem. Recent studies indicate that about two-thirds of American adults are now overweight.<sup>273</sup> The Centers for Disease Control and Prevention now ranks obesity second only to tobacco use as a preventable cause of death, attributing an astounding 400,000 deaths per year to being overweight. In addition to unhealthy eating habits,<sup>274</sup> lack of exercise is the main culprit. Europeans, as any tourist can tell you, tend to walk a lot more than the average American.<sup>275</sup> In part, this is due to the design of their cities and towns, which encourage and enable walking, and roaming rights are an extension of that.

A prime example of the difference in culture is that, in the United States, many golf courses will not allow you to walk; a golf cart is required to ensure speed of play.<sup>276</sup> Even where the course doesn't require a cart, at many courses it is rare to find a walker among the carts. In contrast, on the Old Course at St. Andrews, the most venerated golf course in the world, only those who can provide documentation of a permanent disability can use a "buggy" and no carts are allowed at all on some of the St. Andrews' courses.<sup>277</sup> In fact, most courses in Europe require you to walk unless you are elderly or disabled.

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<sup>273</sup> National Center for Health Statistics, 1999-2000 National Health and Nutrition Examination Survey (NHANES) (available at [www.cdc.gov](http://www.cdc.gov)).

<sup>274</sup> See Morgan Spurlock, "Super Size Me" (2004) (documentary video illustrating effects of fast-food diet).

<sup>275</sup> Recent studies indicate that obesity rates in Europe are rising rapidly, although they are still far below American rates. International Obesity Task Force, EU Platform Briefing Paper, Figure 1 (March 15, 2005), avail. at [http://ec.europa.eu/health/ph\\_determinants/life\\_style/nutrition/documents/iotf\\_en.pdf](http://ec.europa.eu/health/ph_determinants/life_style/nutrition/documents/iotf_en.pdf). Europeans walk, on average, much more than we do. A study found that Germans took trips on foot four times more often than Americans, while the Dutch walked three times more often. Dr. John Pucher and Lewis Dijkstra, "Making Walking and Cycling Safer: Lessons from Europe," 54 *Transp. Quart.* No. 3, at 25 (2000).

<sup>276</sup> Therese Droste, "Walking the Links is Good Exercise, If It's Allowed," *WASH. POST*, at HE06 (May 15, 2001), avail. at [www.popeofslope.com/paceofplay/walking.html](http://www.popeofslope.com/paceofplay/walking.html) (half of public facilities in study require carts).

<sup>277</sup> See [http://www.standrews.org.uk/golf/book\\_golf/trolleys\\_buggies.html](http://www.standrews.org.uk/golf/book_golf/trolleys_buggies.html)

Footpaths and roaming rights are just another example of this cultural emphasis on walking.

5. *Connection to history, culture.*

There is a distinct pleasure in walking a path you know villagers have walked for centuries before you. The use of land in the same way as those previous inhabitants results in a connection to the past, to one's ancestors, through the land itself. Washington Irving, an American visiting Britain, captured the concept beautifully when he wrote approvingly of "the stile and footpath leading from the churchyard, across pleasant fields and along shady hedge-rows, according to an immemorial right of way." He believed the paths "evinced a calm and settled security, and hereditary transmission of homebred virtues and local attachments, that speak deeply and touchingly for the moral character of the nation."<sup>278</sup> This connection to the past, tied to a sense of morality, can inspire and motivate preservation of rustic scenes, of which footpaths and roaming have always been a part.

Perhaps Thomas Hardy was thinking of this feature of a walk in the countryside when he wrote "Wessex Heights" in 1896:

There are some heights in Wessex, shaped as if by a kindly hand,  
For thinking, dreaming, dying on, and at crises when I stand,  
Say, on Ingpen Beacon eastward, or on Wyllys-Neck westwardly,  
I seem where I was before my birth, and after death may be.<sup>279</sup>

Even in the United States, legal recognition of a historic connection to land is quite common. In Iowa, for example, century farms, which have been in the same family for at least 100 years, are entitled to special land use protection, to honor a family's

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<sup>278</sup> Washington Irving, *Rural Life in England* in *The Sketch Book*, quoted in Taplin, *supra* n. \_\_\_, at 17.

<sup>279</sup> Thomas Hardy, "Wessex Heights," in *SELECTED POEMS OF THOMAS HARDY* 43 (John Crowe Ransom ed., 1966).

multi-generational relationship with the land.<sup>280</sup> In adverse possession law, the law recognizes the psychological attachment to land that comes with continued use over time.<sup>281</sup> Historic preservation laws preserve old associations and a sense of history and continuity in our culture. Likewise, arguments for wilderness protection in the United States have emphasized their connection to America's pre-Columbian heritage.<sup>282</sup> Thus, in some ways, walking an ancient traveled way serves in part as an outdoor, interactive museum and in part like a visit to the cemetery.

#### 6. *Sense of community.*

The public's use of footpaths and roaming rights also evokes a sense of community, due in part to a sense of the shared ownership of the land.<sup>283</sup> Instead of "my land" and "your land," it is "our land." Community is also enhanced by the chance meetings of neighbors that occur along the path. In cars, even if you recognize someone whizzing by, you can barely manage a wave before they are gone. On a footpath, greetings are always exchanged and typically, there is time to stop and converse. Even with strangers, the unwritten code of the footpath requires a greeting and often a chat about the weather, the path ahead, and more.<sup>284</sup>

The right to roam also represents a tribute of sorts to the common man. Taplin notes that "[f]ootpaths were made by common men who were obliged to go afoot; they

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<sup>280</sup> Iowa Code §§ 368.26, 403.17(10).

<sup>281</sup> Oliver W. Holmes, "The Path of the Law," 10 HARV. L. REV. 457, 476-77 (1897).

<sup>282</sup> Michael McCloskey, The Wilderness Act of 1964: Its Background and Meaning, 45 OR. L. REV. 288, (1966)

<sup>283</sup> Shoard, *supra* n. \_\_\_, at 50-51 (public has more of a "stake" in the land it uses).

<sup>284</sup> As William Barnes put it:

We souls on foot, with foot-folk meet:  
For we that cannot hope to ride  
For ease or pride, have fellowship.

*Fellowship, Poems*, at 86, quoted in Taplin, *supra* n. \_\_\_, at 50.

are open to all.” She notes the incident in *Pride and Prejudice* when Elizabeth Bennett crossed “field after field at a quick pace, jumping over stiles and springing over puddles.” By using the commoner’s route, “she incurred the class scorn of the Misses Bingley for her muddy petticoat and red cheeks, but she claims the approval of Jane Austen and her readers for her independence and indifference to form.”<sup>285</sup> For Britain, which has always had a hyper-sense of class differences, the right to roam is not just a “public” right, but more specifically a right of those who do not belong to the landed gentry, and therefore, a right to be protected as fiercely as the right to a decent wage or universal health insurance.<sup>286</sup> In a similar vein, Elihu Burritt referred to footpaths as “the inheritance of our landless millions.”<sup>287</sup>

At the same time, public access to private lands helps to break down class differences by establishing a connection between the commoner and the landed gentry. On the footpath, everyone is equal, regardless of who owns the land. Instead of the imposing exclusivity of the modern American gated community, the English footpath allows the poorest plebeian to walk right across Madonna’s estate.

### *Conclusion*

Thus, the public interest supporting a right to roam over private land stems from a variety of significant social values. Its strongest appeal may be the sense of “tranquil

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<sup>285</sup> Taplin, *supra* n. \_\_\_, at 17 (quoting Jane Austen, *Pride and Prejudice*, Ch. VII).

<sup>286</sup> Robin Hood, it may be recalled, was not only stealing from the rich to give to the poor, but was also a prominent poacher on the land of the ruling class. See Stephen Knight and Thomas H. Ohlgren, “*Robyn Hod and the Shryff off Notyngham: An Introduction*,” in *ROBIN HOOD AND OTHER OUTLAW TALES* (1997)(Robin Hood story emphasizes defiance of authority and “Robin Hood plays and games were the most popular form of secular dramatic entertainment in provincial England for most of the sixteenth century”).

<sup>287</sup> Elihu Burritt, *A Walk from London to John O’Groats*, Ch. 1,(2d ed. 1864), quoted in Taplin, at 19.

restoration,” as Wordsworth called it, that a walk in the country brings. In that way, countryside access is cheaper than psychological counseling and given its physical benefits, may reduce national health costs as well. Of course, the private property owner’s right to exclude, against which these public benefits are balanced, is also supported by strong policy reasons, which will be discussed more fully below.

#### **IV. Access Rights in United States in Comparison**

“An American farmer would plough across any such path. . . but here, it is protected by law, and still more by the sacredness that inevitably springs up, in this soil, along the well-defined footprints of the centuries. Old associations are sure to be fragrant herbs in English nostrils, we pull them up as weeds.”

- Nathaniel Hawthorne<sup>288</sup>

In the United States, the balance between public and private rights to land is tipped decidedly toward the landowner. Public access rights are much more limited, although there are some rare instances of easements established by customary use. Moreover, as a matter of constitutional law, a legislative curtailment of the right to exclude, by recognizing a right to roam as in CROW or even more limited public access rights, would be impossible to sustain without compensation. The contrast in approach stems not only from the differences in the two countries’ legal systems, but also from cultural differences that have their roots in the history of United States land development.

##### **A. History of U.S. Land Development**

In Britain, as we have seen, the public’s claim to greater access rights is grounded firmly in their historic use of the property before enclosure. Although the history of land

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<sup>288</sup> Nathaniel Hawthorne, *Leamington Spa* in *OUR OLD HOME*, quoted in Taplin, at 18.

tenure in Britain is complex, its origin in a feudal system resulted in land held subject to the interests of many holders. After the Norman conquest, monarchs were deemed the eminent owners of all property and parceled out large tracts to lords by royal edict.<sup>289</sup> In return for services, a tenant might hold certain property of the lord, but neither could be said to be absolute owner.<sup>290</sup> Of necessity, the commoners living on or near the land had to be taken care of, and common rights arose as a natural consequence. Commoners made great use of the lord's wastelands, which lords countenanced or tolerated. From an economic standpoint, it would have been impossible for the lords to police their wastelands, and since they didn't derive necessary income from them, the expense of policing did not merit the cost. Historically, then, "ownership" of British property has always been subject to the rights of others, either the kings above or the tenants or commoners below.

In the United States, of course, for the most part land was distributed from to individual landowners in fee simple without encumbrances.<sup>291</sup> Some commons arrangements did exist in the colonies, but in most instances the colonists quickly reverted to a private ownership scheme. Professor Ellickson has described how private property rights in the colonies led to economic prosperity, after communal ownership led to economic disaster.<sup>292</sup> Commons arrangements also existed in other parts of the new nation, but by the early 19<sup>th</sup> century, such arrangements were virtually extinct.<sup>293</sup>

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<sup>289</sup> After the Norman conquest, all land in England was deemed to be held subject to the monarch's ultimate authority. J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, at 257 (3d ed. 1990).

<sup>290</sup> *Id.*, at 262-63 (neither lord or tenant could be said to "own" the land in absolute sense).

<sup>291</sup> Of course, in some cases mineral rights were withheld from land grants.

<sup>292</sup> Ellickson, "Property in Land," *supra* n. \_\_, at 1336-42. See also Edward T. Price, DIVIDING THE LAND: EARLY AMERICAN BEGINNINGS OF OUR PRIVATE PROPERTY MOSAIC, at 79 (documents how changing from communal property to private property rights in the Plymouth colony increased corn production).

<sup>293</sup> Stuart Banner, "The Political Function of the Commons: Changing Conceptions of Property and Sovereignty in Missouri, 1750-1850," 41 AM. J. LEGAL HIST. 61, 66 (1997).

In *Dividing the Land*, Edward T. Price details how American land was parceled out in the first instance. He notes that immigrants were attracted to the United States precisely because of the opportunity for freehold tenure.<sup>294</sup> From the beginning, a premium was placed on development, to help the colonies to gain a better foothold in the new world. An immigrant was given a parcel of land in fee (typically around 50 acres), but the freehold was perfected only by actually settling and cultivating the land.<sup>295</sup> Thus, while English lords could allow their land to lie fallow without fear it would be lost, the American settler knew that the land would be his only if it were transformed into productive property.

As the country expanded west under the ideal of “manifest destiny,” settlers willing to brave the wilds were given expansive property rights as a reward. Again, under the various Homestead Acts, a premium was placed on establishing ownership by excluding others, with fences or walls, and putting the land into useful production. Common rights were not considered, both because they were not necessary, but also because they were antithetical to the whole ideal of development and enclosure.<sup>296</sup> Timing also had something to do with the difference in property distribution; by the time most of the United States was being settled, commons systems were on their way out in all modern societies.<sup>297</sup>

Despite these fundamental differences, there are some parallels to the British experience of common rights preceding enclosure. The best examples come from the

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<sup>294</sup> *Dividing the Land*, *supra* n. \_\_\_, at 11.

<sup>295</sup> *Id.* at 14. *See also, id.*, at 343 (“attracting settlers and getting the land in production were the immediate aims of colonial land distribution”).

<sup>296</sup> There were, however, some significant exceptions to this pattern. *See* Stuart Banner, “Commons,” *supra* n. \_\_ (fascinating description of common field system used in St. Louis and surrounding area from 1750-1850).

<sup>297</sup> *See id.* at 66 (“By the time the west was ready for distribution, there was no serious argument to place any productive land in commons”).

West, where ranchers used the open range as a vast grazing commons and cowboys drove cattle hundreds of miles over open lands in the late 1800s. On the Chisholm Trail, for example, a typical cattle drive would move a herd of a few thousand cattle across the Red River from Texas through Oklahoma up to the railroad stop at Abeline, Kansas, a distance of several hundred miles. There were many other routes established by the cattle drives. Similarly, traders established the Santa Fe Trail from Missouri to New Mexico, which the government recognized as a public road in 1848.<sup>298</sup> Settlers moving West used the Oregon Trail, over 2000 miles long, to reach the West Coast from Missouri.<sup>299</sup>

Yet, these paths are relatively minor compared to the fabric of paths criss-crossing England. Moreover, although some of them became highway rights of way, most of these trails fell into disuse and were abandoned as public easements. Settlements were laid out in uniform patterns, with the idea that streets and roads would accommodate travel by carriage and by foot. Therefore, footpaths or other public access rights were not typically reserved in government grants of land.

Although the United States based its legal doctrine on the received common law of Britain,<sup>300</sup> American courts were quick to adapt those rules to the peculiar circumstances of the new nation. The stronger version of property rights that resulted may have grown out of a variety of conditions that differed from the old world. The greater opportunity for and broader distribution of land ownership in the U.S., for example, may have reduced the need for public rights and lessened the class-based tension between landholders and non-landholders. Many large landowners in Britain could trace their holdings to grants from royalty and land was largely concentrated in a

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<sup>298</sup> <http://www.nps.gov/safe/>

<sup>299</sup> <http://www.nps.gov/oreg/>

<sup>300</sup> Bosselman, *supra* n. \_\_\_, at 256-57 (describing reliance of American courts on English common law).

small group of aristocratic owners. Commoners resented the idea that “the privileged few could dictate the terms on which the countryside was used.”<sup>301</sup> In contrast, the American landowner class was much larger and less exclusive, and, having for the most part earned their property through labor (homesteading) or service in a war, the public presumably felt they had earned the right to exclude.

Finally, differing cultural mores developed, which are reflected in the literature and fables of the two countries. Britain produced “The Selfish Giant,” by Oscar Wilde,<sup>302</sup> where a giant turns the local children out of his garden and puts up a sign indicating that “Trespassers Will Be Prosecuted.” The result of this exercise of the right to exclude is catastrophic: Spring refused to return to the giant’s land until he finally relents and lets the children back in.<sup>303</sup> Keeping natural beauty away from the public is portrayed as evil and insisting on the right to exclude is selfish.

Similarly, in “The Secret Garden,” a classic English children’s book published in 1912 by Frances Hodgson Burnett, two neglected children use nature and exercise to heal their own physical and mental health. The children’s discovery of the beauty of the gardens, as well as the surrounding moors, instills a belief in the regenerative power of contact with the natural world, very similar to the policy behind the right to roam. And significantly, the garden is supposed to be off-limits to the children, but only by breaking through that barrier do they find happiness and well-being.<sup>304</sup>

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<sup>301</sup> Shoard, *supra* n. \_\_, at 99.

<sup>302</sup> Although Wilde was born in Ireland, he was educated at Oxford and lived in England much of his life.

<sup>303</sup> Oscar Wilde, “The Selfish Giant.”

<sup>304</sup> Another example is Beatrix Potter’s Peter Rabbit, who is celebrated for his attempts to invade the private garden of evil Mr. McGregor.

On the other hand, Americans grow up with stories of Paul Bunyan, celebrated for his nature-clearing prowess, such as cutting down 23 trees with one swing of his ax.<sup>305</sup> The classic Laura Ingalls Wilder and Willa Cather books celebrate pioneers, primarily homesteaders, and the hard work they did to make the land their own.<sup>306</sup> Western novels and movies depict the struggle for dominion over the open range as an effort to bring human control to wild territory.<sup>307</sup> Although certainly too much can be made of the cultural distinction, most would agree that it is extremely unlikely that an American author would have written a children's book like "The Selfish Giant," which overtly denigrates the zealous defense of private property rights.

### **B. Public Access to the Countryside in the United States**

In the United States, public access to scenic areas will typically be found in some form of government-owned property, such as a park. Public easements in rural areas are mostly limited to old railroad easements opened for public recreation under the Rails to Trails Act. And, while a few states have recognized, in limited instances, the public's common law right to access beaches or other public places, for the most part courts have not been willing to grant public easements absent a strong case for implied dedication. As a result, there is nothing in the United States to compare to the footpaths of Britain, now augmented by the right to roam.

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<sup>305</sup> James Stevens, PAUL BUNYAN (2001)(describing origins of the legendary figure).

<sup>306</sup> See, e.g., Laura Ingalls Wilder, LITTLE HOUSE ON THE PRAIRIE (1935), and Willa Cather, O PIONEERS! (1913).

<sup>307</sup> See, e.g., Jack Schaefer, SHANE, ch.6 (1949); see also *Shane* (Paramount 1952)(classic Western idealizing morality of hero on the side of homesteaders in battle against open range rancher).

Americans do enjoy a wealth of trails on public lands, allowing long hikes through the breathtaking beauty of national parks, forests and wilderness areas.<sup>308</sup> Several long-distance trails -- such as the Appalachian Trail (2,160 miles), the Pacific Crest Trail (2655 miles), and the Continental Divide Trail (3,100 miles) -- simply dwarf their British cousins. Many states have long-distance trails, too. The Centennial Trail in South Dakota, for example, spans 111 miles through the Black Hills and Custer State Park. The 225-mile KATY Trail in Missouri nearly crosses the entire state.

Although these trails provide exceptional recreational opportunities, they do not serve exactly the same functions as the footpath and roaming rights discussed above. Except for the trails located on old railroad easements, these long-distance trails are found almost entirely on vast expanses of public lands (national or state parks or forests), which almost by definition are remote from civilization and inaccessible to all but serious hikers. These are not trails for the person who just wants to take a walk before dinner. In many cases, even those who live nearby have to drive to get to a trailhead.<sup>309</sup>

This is not to denigrate these trails – they are a magnificent achievement and glorious for those who have the time and ability to get to them. But they are also in keeping with the American tradition of separating nature from human habitation. Although some modern developments are incorporating more greenbelts and trails, for the vast majority of Americans there is still no possibility of walking out the front door to reach a trail.

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<sup>308</sup> See James J. Vinch, “The Telecommunications Act of 1996 and Viewshed Protection for the National Scenic Trails,” 15 J. Land Use & Env. L. 93 (1999) (describing the system of national trails).

<sup>309</sup> For example, I recently stayed in Keystone, near Mount Rushmore. The town is nestled in some of the most beautiful Black Hills scenery, and is typically jam-packed with tourists during the season, yet there are no walking trails that one can get to without getting into a car and driving at least five miles.

### C. Common Law Public Access Rights

In the United States, public rights of way may be established by prescription or implied dedication, but in general courts do not recognize customary rights.<sup>310</sup>

Customary rights typically would allow a court to open an entire category of lands (e.g., beachfront property) to public access, which would avoid the case-by-case determination of public use required under an implied dedication claim. Prescriptive rights are even less advantageous, as they may allow access only for adjacent landowners rather than the public in general.

The New Mexico Supreme Court's recent treatment of an easement by prescription claim illustrates the difficulty of attempting to establish a right of way based on historic use. In *Algermissen v. Sutin*,<sup>311</sup> the court rejected a claim by neighbors to continue their long-time use of a dirt path over defendants' property to reach a state park for recreational purposes (jogging, horseback riding, hiking, etc.). The court found sufficient evidence to conclude that the neighbors had the implied permission of the landowners. Evidence of permission from the 1940's was sufficient to support a presumption that the use remained permissive into the 1990's.

The court also discussed another possible impediment to a prescriptive claim, the "neighbor accommodation" exception, under which a court does not presume adverse use when the "claimed right-of-way traverses large bodies of open, unenclosed, and sparsely populated privately-owned land."<sup>312</sup> Although the court limited the application of this doctrine to expansive tracts of land, where owners could not reasonably be expected to

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<sup>310</sup> See generally Rose, at 739-40 (custom used rarely in U.S. to support public easement claims).

<sup>311</sup> 133 N.M. 50, 61 P.3d 176 (N.M. 2002).

<sup>312</sup> *Id.* at 182.

have knowledge of the intrusion, it would effectively preclude many claims attempting to establish roaming rights in remote scenic areas. The neighbor accommodation doctrine does, however, encourage landowners to allow neighbors to freely traverse their property, knowing that they are not thereby in danger of relinquishing their right to exclude.

Obtaining access to private land based on implied dedication is equally difficult. Courts require that the landowner somehow indicate an intention to dedicate the right of way and, as the South Carolina Supreme Court put it, “[d]edication is not implied from the permissive, sporadic and recreational use of the property.”<sup>313</sup>

Easements based on public customary use, such as the village green cases in England,<sup>314</sup> are not generally favored in the United States. In *Graham v. Walker*,<sup>315</sup> the Connecticut Supreme Court rejected a claim for a right of way based on custom. Residents of Blissville argued that their inhabitants, from time immemorial, had used defendant’s land to get to nearby Taftville and therefore claimed to have established a customary right of way. The Connecticut Supreme Court noted that such an easement in gross could be established in England, but refused to apply English law, noting that the state’s “political and legal institutions have from the first differed in essential particulars from those of England.”<sup>316</sup> A right of way held by villagers in gross, the court determined, could not be recognized under American law.<sup>317</sup> However, the court was willing to allow a claim of a prescriptive easement, established by continuous use for the statutory period, in favor of appurtenant landowners.

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<sup>313</sup> *State v. Beach Co.*, 271 S.C. 475, 248 S.E.2d 115, 119 (1978).

<sup>314</sup> See *supra* Section II.C.

<sup>315</sup> 61 A. 98, 78 Conn. 130 (1905).

<sup>316</sup> 61 A. at 99.

<sup>317</sup> 61 A. at 99-100 (“To a fluctuating body of that kind no estate in lands can be granted”).

Limiting prescriptive rights only to other landowners explicitly favors one class (those wealthy enough to own land) over another (renters or homeless). Courts may have adopted this dividing line as a means of preventing easements from becoming overly burdensome. By limiting the right of way to other landowners, whose land may be reciprocally burdened in the same way, the rights would necessarily be limited in scope. However, the result is that the public in general, and more specifically those who can't afford to own property themselves, are excluded. Thus, the prescriptive easement, even if it can be established, would not be the equivalent of the British footpath, open to all.

The most prominent decision recognizing access based on custom came from the Supreme Court of Oregon in *State ex rel. Thornton v. Hay*,<sup>318</sup> in which it recognized a public right of access to oceanfront beaches.<sup>319</sup> Relying on the English doctrine, the court found that the public had used the dry sand area along Oregon's Pacific coast "as long as the land has been inhabited."<sup>320</sup> Requiring a beach-by-beach determination based on prescription, the court found, would be unduly burdensome and unnecessary. "Oceanfront lands from the northern to the southern border," the court determined, "ought to be treated uniformly."<sup>321</sup>

In a later case, the Oregon Supreme Court determined that this declaration of public access rights based on custom did not constitute a taking of beachfront owners' property rights. In *Stevens v. City of Cannon Beach*,<sup>322</sup> the court held that, under *Lucas*,

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<sup>318</sup> 254 Ore. 584, 462 P.2d 671 (1969).

<sup>319</sup> Along with access to the beaches, the public's right to use the beaches themselves is a complex subject based on the each state's application of custom, prescription, and implied dedication doctrines. See Joseph J. Kalo, "The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina," 78 N.CAR. L. REV. 1869 (2000).

<sup>320</sup> 462 P.2d at \_\_\_\_.

<sup>321</sup> 462 P.2d at 676.

<sup>322</sup> 317 Ore. 131, 854 P.2d 449 (1993).

the public's right of access should be considered one of the "background principles" of state law that inhere in every property owner's title.<sup>323</sup> Therefore, the property owner never had a right to exclude the public from the beach and the recognition of that in *Thornton* did not destroy a previously existing right.

Although the U.S. Supreme Court declined to review the *Cannon Beach* case, Justice Scalia, joined by Justice O'Connor, dissented from the certiorari denial.<sup>324</sup> Justice Scalia laced his opinion with expressions of doubt about whether the Oregon Supreme Court was "creating" rather than "describing" the custom of public access.<sup>325</sup> Nevertheless, the majority of Court declined to interfere with this allocation of the right of access to the public.

The Oregon right of customary beach access comes closest to the British recognition of an easement for the general public for recreational purposes. The doctrine, however, prevails in only one state and has been expressly rejected by several others.<sup>326</sup> Moreover, even in Oregon the public right of customary access is limited to beachfront property.

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<sup>323</sup> *Id.* at 142-43, 854 P.2d at 456-57.

<sup>324</sup> 510 U.S. 1207 (1994)(dissenting from denial of petition for certiorari). Justice Scalia's dissenting opinion is truly a case study of his zeal with regard to property rights. Scalia argued that the Supreme Court of Oregon, in *McDonald v. Halvorson*, 308 Ore. 340, 780 P.2d 714 (1989), had limited *Thornton*'s reach to only those areas that could be proven to have been customarily used by the public. *McDonald*, however, announced that rule only for areas *other than* the dry sand area adjacent to the Pacific Ocean. *McDonald* dealt with a *freshwater* pool not bordering the ocean, which Scalia does not even mention. Moreover, it is unusual that the Supreme Court would tell the Oregon court how to read its own precedent. *See, e.g., id.* at 1334 n.3 (in which Scalia finds the Oregon Supreme Court's seemingly logical reading of *Thornton* "unsupportable"). One is left with the impression that Scalia believes that states are not free to depart from his own vision of Blackstonian absolutism in property rights.

<sup>325</sup> *See, e.g., id.*, at 1335 n.4.

<sup>326</sup> *See* Steven W. Bender, "Castles in the Sand: Balancing Public Custom and Private Ownership Interests on Oregon's Beaches," 77 OR. L. REV. 913, 914 (1998)(most jurisdictions rely on "parcel-specific doctrines of easements by prescription and implied dedication"). *Cf.* Restatement (Third) of Property: Servitudes, § 2.18 cmt. f (2000)(most jurisdictions "have been reluctant to recognize prescriptive rights to recreational uses other than on beaches"). The Oregon doctrine of customary access has met with harsh criticism as well. *See, e.g.,* David J. Bederman, "The Curious Resurrection of Custom: Beach Access and Judicial Takings," 96 COLUM. L. REV. 1375, 1447-55 (1996) (critiquing Oregon beach decisions as "judicial activism").

#### **D. Constitutional Limitations on Public Access: The Right to Exclude**

The most salient difference between United States and British property law is the limitation on government intrusion contained in the takings clause of the 5th Amendment to the American constitution. CRow's reallocation of property rights, without compensating the landowners, would almost certainly have been struck down by American courts as an unconstitutional taking. In Britain, however, there is no constitutional property protection, although Parliament has provided compensation for most significant impacts on landowners. In this case, however, compensation was not provided because Parliament felt that the impact on landowners would be minimal and not worth the cost of setting up a compensation mechanism. After all, allowing the public to walk over lands such as mountains or moors, that were not really being used for anything anyway, would not preclude any existing uses. That sort of balancing approach to the question of compensation, however, has been banished in American courts, by Supreme Court precedent requiring a categorical approach to the right to exclude.

The "right to exclude" has been enshrined in the United States as "one of the most essential sticks in the bundle of rights that are commonly characterized as property."<sup>327</sup> The Supreme Court first made this pronouncement in *Kaiser Aetna v. United States*, which involved the public's right to access a private pond that had been dredged and converted into a marina by connecting it to the nearby bay. The government argued that this action subjected the water to the federal navigational servitude that covers all waters of the United States. The Court, however, rejected that argument, holding that the

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<sup>327</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). See Rose, *supra* n. \_\_\_, at 711-12 (discussing wide agreement regarding importance of right to exclude).

imposition of such a servitude would amount to a taking of property without compensation in violation of the Fifth Amendment.<sup>328</sup>

In so holding, the Court explicitly determined that the "right to exclude," so universally held to be a fundamental element of the property right, falls within th[e] category of interests that the Government cannot take without compensation."<sup>329</sup> Interestingly, for this view of the right to exclude as "fundamental," the Court cited only three sources: a Claims Court case,<sup>330</sup> a Fifth Circuit case,<sup>331</sup> and Justice Brandeis's dissent in an intellectual property case.<sup>332</sup> None of these sources really support the notion that the right to exclude must be absolute. The Claims Court case, for example, deals with the exclusive occupancy necessary to establish "Indian title."<sup>333</sup> The Fifth Circuit's mention of the right to exclude was pure dicta, occurring in a discussion of when the risk of loss passes to a buyer of goods.<sup>334</sup> And Justice Brandeis (a lone justice, in dissent) quickly qualified his comment about the right to exclude by noting that it could indeed be modified if "the property is affected with a public interest."<sup>335</sup>

Despite the slender reed upon which the Court declared the "right to exclude" to be "fundamental" and "essential," later cases used *Kaiser Aetna* to further solidify the absolute nature of this stick in the bundle. In *Loretto v. Teleprompter Manhattan CATV*, the Supreme Court held that even the *de minimus* intrusion of a cable TV box could not

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<sup>328</sup> *Id.*, at 180.

<sup>329</sup> *Id.*

<sup>330</sup> *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394, 206 Ct.Cl. 649, 669-670 (1975)

<sup>331</sup> *United States v. Lutz*, 295 F.2d 736, 740 (5th Cir. 1961).

<sup>332</sup> *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting opinion)( "[a]n essential element of individual property is the legal right to exclude others from enjoying it").

<sup>333</sup> 513 F.2d at 1394.

<sup>334</sup> 295 F.2d at 740.

<sup>335</sup> 248 U.S. at 250.

be countenanced without compensation.<sup>336</sup> If a small, mute and stationary object violates the Court's categorical right to exclude, then a “right to roam” or other public easement surely would be insupportable.

Indeed, in *Nollan v. California Coastal Comm'n*,<sup>337</sup> the Supreme Court explicitly held that the imposition of a public right of way in exchange for a building permit constituted a taking of property, which required compensation to sustain it.<sup>338</sup> The public's need or desire for the easement did not avoid the constitutional proscription against taking a property right without paying for it. Moreover, the Court held, the right to build on the property could not be conditioned on the grant of an easement, a scheme the Court likened to “extortion.”<sup>339</sup>

In dissent, Justice Brennan noted that the development condition was in fact consistent with “settled public expectations,” shaped by the California constitutional provision prohibiting private landowners from obstructing the public's access to navigable waters.<sup>340</sup> Thus, Brennan concluded, “California has clearly established that the power of exclusion for which appellants seek compensation simply is not a strand in the bundle of appellants' property rights.”<sup>341</sup> Brennan also noted that the burden on the landowners would be slight, because their privacy would not be appreciably infringed by

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<sup>336</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

<sup>337</sup> 483 U.S. 825 (1987).

<sup>338</sup> 483 U.S. at 833-34.

<sup>339</sup> 483 U.S. at 837; *see also Dolan v. City of Tigard*, 512 U.S. 374 (1994) (bike trail may be demanded as condition of development permission only if access demanded is “roughly proportional” to the additional transportation burden caused by development ).

<sup>340</sup> 483 U.S. at 847-48 (Brennan, J., dissenting); *see also* Jerry L. Anderson, “Takings and Expectations: Toward a ‘Broader Vision’ of Property Rights,” 37 KAN. L. REV. 529 (1989).

<sup>341</sup> 483 U.S. at 858 (Brennan, J., dissenting).

the few feet of right of way, as the public could already pass by the house from the wet sand portion of the beach.<sup>342</sup>

Justice Brennan's balancing of interests and willingness to find a public easement inherent in the landowner's bundle of sticks is much more akin to the rationale justifying the "right to roam," but of course his views did not prevail in *Nollan*.<sup>343</sup> Thus, unless previous use had ripened into a right by prescription or implied dedication,<sup>344</sup> the type of public right of way conferred by CRoW could be obtained in the U.S. only by compensating the landowner.<sup>345</sup> The legislature could decide to reallocate the sticks in the bundle, but only by compensating the losing party.

Congress apparently did just that in the "rails-to-trails" amendment to the National Trail System Act (NTSA).<sup>346</sup> Under the NTSA, the Interstate Commerce Commission may preserve railroad rights of way for the future by allowing them to be used, on an indefinite "interim" basis, as recreational trails.<sup>347</sup> Under the terms of most railroad easements, the right of way is lost when railroad use is abandoned; at that point, full use and ownership of the property would revert to the fee owner, usually the adjacent landowner. Congress effectively re-wrote the terms of these easements by declaring,

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<sup>342</sup> 483 U.S. at 853-54 (Brennan, J., dissenting) (intrusion "minimal").

<sup>343</sup> The *Nollan* decision was 5 to 4, indicating some hope that the majority position will be modified in future cases, but for now, the pre-eminent place of the "right to exclude" is assured. See also *Dolan*, 512 U.S. 374 (another 5-4 decision reaffirming importance of right to exclude). Justice Stevens in dissent lamented the Court's "narrow focus on one strand (the right to exclude) in the property owner's bundle of rights". *Id.* at 401.

<sup>344</sup> In fact, in *Nollan*, the public may have already acquired the right of access by prescription or dedication, but that issue was not before the Court. 483 U.S. at 862 (Brennan, J., dissenting).

<sup>345</sup> It could also be possible to condition development permission on the grant of access rights, but only if the government could establish the proper nexus. It might be possible, for example, to claim that a particular development would cause an increased burden on existing transportation systems and therefore require a footpath as an exaction. See *Dolan*, *supra* n. \_\_\_, 512 U.S. at 2319-20 (describing requirements of "rough proportionality" test).

<sup>346</sup> 16 U.S.C. §§ 1241 et seq. See generally Danaya C. Wright, "Eminent Domain, Exaction, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence?" 26 COLUM. J. ENVTL. L. 399 (2001).

<sup>347</sup> Section 8(d), 16 U.S.C. § 1247(d).

legislatively, that recreational trail use would not constitute “abandonment” and therefore, the landowner’s reversionary interest was not triggered.

This type of readjustment in the bundle of sticks is not countenanced by American courts without compensation. When adjacent landowners claimed that the NTSA amounted to a taking of their property, the Supreme Court, in *Presault v. Interstate Commerce Comm’n*,<sup>348</sup> avoided answering the question by directing them to seek a remedy, if a taking had occurred, under the Tucker Act.<sup>349</sup> Subsequently, the Court of Appeals for the Federal Circuit held that the conversion of the easements to recreational trail use had worked a taking, requiring compensation.<sup>350</sup> The government had argued that adjacent landowners never really had any reasonable expectation of recovering the land free of the easement; thus, its conversion to trail use did not really take anything. The court, however, adopted a formalistic analysis, finding that the trail was a physical occupation of plaintiffs’ land, and therefore constituted a taking.<sup>351</sup>

The government also argued that the original scope of the easement, for railroad purposes, could be construed to include other public uses, such as recreational hiking and biking. Although Vermont state law, which applied to the easement interpretation, allowed the scope of the easement to be adjusted to fulfill its purpose in changing circumstances, the court found that the nature of recreational trail use was too different from railroad use to fall within its scope.<sup>352</sup> While trains were noisy, they were also

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<sup>348</sup> 494 U.S. 1 (1990).

<sup>349</sup> *Id.* at 17.

<sup>350</sup> *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996).

<sup>351</sup> 100 F.3d at 1539-40.

<sup>352</sup> 100 F.3d at 1541-44.

limited in their frequency, whereas recreational users may be present at any time and they may be more difficult to contain within the easement's boundaries.<sup>353</sup>

The Rails-to-Trails case indicates how strictly American courts view the right to exclude. Even though to many, a hiker or a biker would seem much less of a burden on the adjacent landowner than a passing train, courts refuse to engage in any balancing of burdens in protecting the right to exclude. Any intrusion is actionable, and even where the public owns a right of way, its scope will be strictly construed. The case strongly indicates that any attempt to impose an easement along the lines of CRoW would not be sustainable absent compensation.

#### **E. Arguments for Additional Public Access Rights**

“[A]t daybreak I am the sole owner of all the acres I can walk over. It is not only boundaries that disappear, but also the thought of being bounded. Expanses unknown to every deed or map are known to every dawn, and solitude, supposed no longer to exist in my county, extends on every hand as far as the dew can reach.”

- Aldo Leopold<sup>354</sup>

Given the differences between the two countries, in history, culture, and legal systems, is there anything America can learn from the British adoption of the right to roam? Of course, it is extremely unlikely our state or federal legislature will suddenly decide to adopt the equivalent of CRoW here, even if it were constitutional. Yet, the story behind CRoW contains some interesting lessons Americans could profit from studying.

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<sup>353</sup> 100 F.3d at 1543.

<sup>354</sup> “Great Possessions,” in *A SAND COUNTY ALMANAC*, at 44 (Ballantine ed. 1970).

First, as I have pointed out in at greater length elsewhere,<sup>355</sup> Britain's right to roam represents a rather dramatic re-allocation of one of the sticks in the property rights bundle from the landowner to the public. The example teaches us that the composition of the bundle is not necessarily immutable, and that changes may be desirable to better reflect contemporary society's needs and values. Of course, the relative stability of property rights is extremely valuable, because it honors settled expectations and therefore promotes economic transactions and furthers our desire for fairness. But property rights must evolve and the right to roam reminds us that, in the end, the recognition of the private owners' rights involves a trade-off with public interests that should not be ignored.

Second, the right to roam represents a welcome return to a more interrelated, functional approach to property, which we once thought to be banished to the wastebins of history. Stuart Banner has pointed out that Americans have become so accustomed to the distinction between public and private property, we have lost the ability to imagine possible gradations between the two.<sup>356</sup> We have public property, for hiking and wandering, and private property, to stay off of. Property theorists spend a lot of time on the question of whether property is best held by private owners or in common, but very little on anything in-between.<sup>357</sup> The right to roam reminds us that it is possible to allow the public certain limited uses, while leaving the fee in private hands. There are numerous ways, in other words, to allocate the bundle of sticks without abandoning the idea of private property in general.

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<sup>355</sup> See Jerry L. Anderson, "Comparative Perspectives on Property Rights: The Right to Exclude," \_\_ J. LEGAL EDUC. \_\_ (forthcoming 2006).

<sup>356</sup> Stuart Banner, "Commons," *supra* n. \_\_, at 63-64.

<sup>357</sup> See, e.g., Rose, *supra* n. \_\_, at 720-21 (discussing "standard paradigm" which recognizes only public and private property).

Finally, the right to roam suggests that we should consider whether we have undervalued the public access side of this equation, and whether there are ways, consistent with our own culture and legal framework, to further the important public interests represented by CRoW.<sup>358</sup> It is, in fact, possible to construct a strong argument in favor of modifying the formalistic notion of an absolute right to exclude. Interestingly, none of the other “sticks” in the landowner’s bundle have acquired the categorical status of the right to exclude. Yet, there is little reason to support the absolute form of the right.

In terms of morality, there are strong arguments to be made in favor of more public rights to private property. Many philosophers assert that land is, at bottom, the “common inheritance” of all.<sup>359</sup> We may have parceled it out for reasons of economic efficiency and fairness, but there is no moral imperative against allowing access. Indeed, the moral argument suggests that true freedom should include the right to walk wherever one pleases, unless the landowner can make a case that it is unduly burdensome.<sup>360</sup> We would balk, presumably, at allowing private owners to cut off our ability to boat down the Mississippi, because it would interfere with our freedom to travel. Why do we allow our right to travel over land to be cut off at every fencepost?

In economic terms, the argument for an absolute right to exclude fares no better.

In enacting the right to roam, Parliament weighed the potential for damage to individual

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<sup>358</sup> See Kevin Gray and Susan Francis Gray, “The Idea of Property in Land,” in *LAND LAW: THEMES AND PERSPECTIVES* 38-39 (Susan Bright and John Dewar, eds., 1998), *quoted in* Laura S. Underkuffler, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003), at 93 n.27. (“In a crowded urban environment, where recreational, associational, and expressional space is increasingly at a premium, an unanalyzed, monolithic privilege of ... exclusion is no longer tenable”).

<sup>359</sup> John Stuart Mill, *PRINCIPLES OF POLITICAL ECONOMY*, vol. I, 321-38 (5th ed., 1865) (“land of every country belongs to the people of that country”); Thomas Paine, *AGRARIAN JUSTICE* (1796), in Mark Philip, *THOMAS PAINE: RIGHTS OF MAN, COMMON SENSE AND OTHER POLITICAL WRITINGS*, at 417-19 (1975); Thomas Jefferson, Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), in *THE PORTABLE JEFFERSON* 395, 396-97 (M. Peterson ed. 1975) (“earth is given as a common stock for man to labour and live on” and property rights should be modified if necessary to serve greater needs of society).

<sup>360</sup> See Shoard, *supra* n. \_\_\_, at 147, 286-87.

landowners from public intrusion and found very little to be concerned about, with regard to these types of land – mountains, moors, heath, and downland – where crops would not be growing and little damage could be done. The value to the public, however, as described in Section III above, was much higher than the expected costs. Naturally, given the estimated costs and benefits, it would be possible for individual landowners to reach agreements with the public regarding access rights, in exchange for compensation. But the transaction costs of reaching individualized agreements for access would prevent them in most cases.<sup>361</sup>

Professor Ellickson suggests, however, that the right to exclude may be more economically efficient than the right to roam:

If decentralized negotiations between Blackstonian neighbors cannot be counted on to generate an efficient transportation network, why shouldn't a group simply confer on its members reciprocal and routine privileges to transport themselves across all private land? The reason is manifest: entrants may damage crops, commit thefts, and do other mischief. Reciprocal rights of passage would undermine the basic virtue of parcelization, namely, the relative ease with which a person can monitor boundary crossings, as opposed to the quality of an entrant's behavior. If privileges of passage were routine, guard dogs and motion detectors would lose most of their usefulness.<sup>362</sup>

Ellickson goes on to posit that exceptions to the general right to exclude occur only when they are efficient: e.g., where “the would-be entrant would objectively value entry far more than the landowner would objectively suffer from the entry” or where the burden of monitoring the trespass would be slight.<sup>363</sup> In addition, the likelihood of damage to the landowner from the trespass should be considered: “The less vulnerable a tract is to

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<sup>361</sup> See generally, Banner, *Transitions*, *supra* n. \_\_\_, at 360-61. See also, Michael A. Heller, “The Boundaries of Private Property,” 108 *Yale L.J.* 1163,1209-10 (1999) (*Nollan*’s formalistic approach to labeling private property rights may block the “optimal social level of use of beaches”).

<sup>362</sup> Ellickson, *Property in Land*, *supra* n. \_\_\_, at 1382.

<sup>363</sup> *Id.*, at 1382-83.

damage, the more likely nonowners are deemed privileged to enter it.”<sup>364</sup> Finally, Ellickson suggests that modifications to the right to exclude should be sensitive to transactions costs associated with gaining the owner’s permission to enter.<sup>365</sup>

These considerations seem to support the right to roam as set forth in CRoW. Parliament has chosen specific categories of land that contain the most elements of scenic beauty, thereby representing high value to the public, while at the same time presenting little potential for damage. Moreover, because landowners probably rarely spend much time or resources monitoring their moors or mountains, in most cases, monitoring costs probably would not greatly increase. These are not lands where it is likely that public entrants will “damage crops, commit theft or do other mischief,” because there is little to steal and no crops are grown on the mountain and moor. Of course, it may be that the British “code of conduct,” the unwritten law governing public behavior when exercising the right to roam, makes the intrusion less worrisome as well.

Thus, as long as the right to roam is limited to those types of land where the balance tips most strongly in favor of public use, it likely comports with economic principles. H.G. Wells put it more succinctly, in expressing his support for a right to roam anywhere “where his presence will not be destructive of its special use, nor dangerous to himself, nor seriously inconvenient to his fellow citizens.”<sup>366</sup> Mill similarly argued that public access should not be denied “except to the extent necessary to protect the produce against damage, and the owner’s privacy against invasion.”<sup>367</sup> According to

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<sup>364</sup> *Id.*, at 1383.

<sup>365</sup> *Id.*

<sup>366</sup> H.G. Wells, “On War Aims: The Rights of Man,” *THE TIMES*, at 6 (Oct. 25, 1939), quoted in Shoard, *supra* n. \_\_\_, at 263.

<sup>367</sup> John Stuart Mill, *PRINCIPLES OF POLITICAL ECONOMY*, Book II, Ch. 2, § 6 (Kelley ed. at 235). Mill complained about the “pretension” of two Dukes who shut off mountain scenery from public roaming

Mill, “[t]he species at large still retains, of its original claim to the soil of the planet which it inhabits, as much as is compatible with the purposes for which it has parted with the remainder.”<sup>368</sup>

Short of a revolution in American thinking about the right to exclude, however, it is difficult to imagine serious modifications to the right to exclude anytime soon. It is much more useful, therefore, to imagine other ways to facilitate movement toward greater public access. It is possible, for example, that many landowners would voluntarily allow the public to use their lands for roaming. For those lands, there are a number of minor impediments that could be easily removed. First, there is a lack of information. While it is easy to find the “no trespassing” sign, landowners rarely hang out a “trespassers welcome” sign. The state government agency in charge of natural resources could facilitate the collection and dissemination of information about which areas are “open for walking,” perhaps in the form of a map. Legislation could provide a voluntary mechanism for registering land as open for access, while providing rules for those taking advantage of the scheme to lessen damage or privacy concerns. Landowners would be encouraged to allow hikers if they could be assured that they would be immune from liability for any injuries and that the use could not ripen into some sort of prescriptive easement.

Recognizing the clear public benefits from additional access to the countryside might also lead legislatures to investigate greater use of their condemnation authority for this purpose. We readily condemn land for highways to ensure automobiles can go from Point A to Point B, but often seem reluctant to use that authority to allow people to walk

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merely so as not to disturb wild animals they wanted to hunt. Mill called it an “abuse” of the right of property. *Id.*

<sup>368</sup> *Id.*

there. Public access could also be made a condition of government payments for agricultural conservation set-asides.

The British experience reminds us of the importance of ensuring public access to natural areas, even those on private lands. Americans, however, are more likely to use a different set of tools to achieve that goal. As the nation matures and the cultural baggage of the homestead era begins to fade, we may begin to place more emphasis on the public's freedom to roam and less on protecting an absolute right to exclude.

## V. Conclusion

“[A] race that neglects or despises this primitive gift, that fears the touch of the soil, that has no footpaths, no community of ownership in the land which they imply, that warns off the walker as a trespasser, that knows no way but the highway, the carriage-way, that forgets the stile, the footbridge. . . is in a fair way to far more serious degeneracy.”

- John Burroughs<sup>369</sup>

Unfortunately, Burroughs may have had the United States in mind in describing his view of a degenerate society. It is clear that the American public places far less value on a countryside walk than the British do. Partially, it is due to a much harsher climate, so that it sometimes seems that the weather moves from intolerably hot and humid to intolerably cold without many days of glory in between. Nevertheless, many lament our separation from the environment: as we move from our air-conditioned house to our air-conditioned car to our air-conditioned office, we can go weeks at a time without coming in contact with nature. We can get exercise, surely, at the health club, but it is most often while watching CNN or listening to our Ipod. Along the way to this hermetically

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<sup>369</sup> John Burroughs, *Exhilarations of the Road* in WINTER SUNSHINE: THE WRITINGS VOL. II (1895), quoted in Taplin, at 17-18.

sealed existence, we may have lost something that a walk in the countryside might help us regain.

Britain's right to roam can easily be derided by critics as the product of a society verging on socialism.<sup>370</sup> The review of the historic progression of access rights in Britain shows that CRoW can also be seen as the restoration, in part, of a freedom that commoners lost during the enclosure period. It can also be viewed as a step back toward a functional approach to property rights, moving away from a strictly spatial system, and achieving a greater good. Moreover, it can be seen as a refutation of Blackstonian absolutism, proving that furthering the goals of our property rights system requires balancing private and public interests, rather than a categorical right to exclude. And perhaps the right to exclude is not as "essential" a stick in the bundle as the Supreme Court has heretofore regarded it.

In Scandinavia, "allemansträtten" give everyone the right to cross the private property of another. Allmansrätten translates, very simply, into "the rights of everyone." Look out across the countryside where you live and ask, why shouldn't I have the right to go there? Look at a nearby mountain and ask, is the view from peak no less mine than the ocean or the river? Would my life be different if I could walk out my front door and head across the hills, to discover who knows what? Shouldn't true freedom include that fundamental right? Britain's resurrection of the right to roam causes us to ask these questions. Perhaps we will arrive at somewhat different answers than the British have, but they are undoubtedly questions that need to be asked.

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<sup>370</sup> During the debates on CRoW, some members of parliament called it just that. *See, e.g.*, Hansard, Debates, House of Commons, March 26, 1999, pt. 14 (statement of Mr. Peter Atkinson).